92-275

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAMES HAMILTON, GERALD CRANK,
ANTHONY RUSSELL and GERALD CARRELL,
Petitioners,

vs.

KOMATSU-DRESSER, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

R. WAYNE HARVEY
HARVEY & STUCKEL, CHTD.
900 River Valley Plaza
Peoria, Illinois 61602
(309) 671-4900

Counsel of Record for Petitioners

OF COUNSEL:
R. WAYNE HARVEY
AMBROSE V. MCCALL
HARVEY & STUCKEL, CHTD.
900 River Valley Plaza
Peoria, Illinois 61602
(309) 671-4900

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED

1. Whether the Civil Rights Act of 1991 overruled the decision of the United States Supreme Court in *Lorance v. A T & T Technologies, Inc.*, 490 U.S. 900 (1989)?

2. What law on the statute of limitations for filing a charge of age discrimination was in effect at the time the Seventh Circuit Court of Appeals affirmed the District Court's entry of summary judgment in favor of Respondent and in support thereof cited the case of *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989)?

3. Whether the standard for applying the Civil Rights Act of 1991 retroactively, in effect at the time the present appeal of the case was pending, is controlled by the test and standards set forth in *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974) or the analysis contained in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988)?

4. Should the courts retroactively apply the portions of the Civil Rights Act of 1991 which constitute procedural amendments or in the alternative, restore the understanding of the applicable procedures for filing a charge of discrimination to the time prior to the Supreme Court decision in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989)?

5. Should the Seventh Circuit retroactively apply *Lorance* on the issue of whether Petitioners timely filed their charges of discrimination according to the applicable statute of limitations?

6. When does the limitations period for filing a charge of age discrimination accrue under the Age Discrimination in Employment Act?

7. Did the Civil Rights Act of 1991, in overruling *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), also overrule *Delaware State College v. Ricks*, 449 U.S. 250 (1980) to the extent it was cited and relied upon by the United States Supreme Court in the case of *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989)?

8. Did Petitioners file timely charges of age discrimination with the Equal Employment Opportunity Commission pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §626(d)?

LIST OF PARTIES

The parties to the proceeding before this Court are:

Petitioners:

JAMES HAMILTON, GERALD CRANK, ANTHONY RUSSELL, and GERALD CARRELL, individually.

Respondent:

KOMATSU-DRESSER, INC.

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KOMATSU-DRESSER, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, JAMES HAMILTON, GERALD CRANK, ANTHONY RUSSELL and GERALD CARRELL, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on May12, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is to be reported at 964 F.2d 600 (7th Cir. 1992). The slip opinion received by Petitioners is reprinted in the appendix, Appendix C.

The decision and opinion of the United States District Court for the Central District of Illinois has not been reported but is reprinted in the appendix, Appendix B, *infra*.

JURISDICTION

This cause arose under 29 *United States Code* 621, et al. and specifically alleged violations of 29 *United States Code* 623. The United States District Court for the Central District of Illinois had jurisdiction under 29 *United States Code* 626 and 28 *United States Code* 1331. On May 24, 1991, the District Court granted Respondent's Motion for Summary Judgment.

The Court of Appeals for the Seventh Circuit had jurisdiction of this cause under 28 *United States Code* 1291. On May12, 1992, the Court of Appeals issued its decision which affirmed the District Court's grant of summary judgment in favor of Respondent. The Seventh Circuit reached its decision by holding that the decisions by Respondent to refuse to promote Petitioners and subsequently to initiate and enact the layoff of Petitioners flowed from Respondent's refusal to train the Petitioners. The Court held that the Petitioners could not file their charges of age discrimination in a timely manner from the dates Respondent failed to promote Petitioners or from the dates Petitioners were laid off. The Court further held that the Petitioners should have received notice that since Respondent refused to provide the comprehensive 1-C training to Petitioners, Respondent would lay off Petitioners pursuant to the modified collective bargaining agreement. Therefore, the Court found that even though Petitioners received some of the training required to be a 1-C employee, after Respondent first refused to provide any training to Petitioners, that Petitioners should have acquired notice that Respondent's refusal to train them would result in the effects of Respondent denying Petitioners their requested promotions and Respondent laying off Petitioners. By its ruling, the Court required Petitioners and any other similarly situated person complaining of age discrimination specifically, or other types of

discrimination, to file a charge of discrimination with the Equal Employment Opportunity Commission within 180 or 300 days of an alleged discriminatory act where the Petitioners or any other employee might subsequently be wrongfully denied a promotion, could possibly sustain a discriminatory layoff or might by chance suffer a discriminatory discharge in violation of the applicable civil rights or antidiscrimination laws.

This Court has jurisdiction to review this case under 28 *United States Code* 1254.

STATUTES INVOLVED

29 *United States Code* 621:

> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) The existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
>
> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather

than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 *United States Code* 623(a):

(a) Employer Practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 *United States Code* 626(d):

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of

notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 *United States Code* 633(b):

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

42 *United States Code* 2000e-5(e) in effect before November 21, 1991:

> (e) A charge under this section shall be filed within one hundred eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person

against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 *United States Code* 2000e-5(e) following enactment of 1991 Civil Rights Act Amendment and effective on November 21, 1991:

(e)(1) A charge under this section shall be filed within one hundred eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

1991 Civil Rights Act, S.1745, Section 2:

The Congress finds that—

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

1991 Civil Rights Act, S.1745, Section 3:

The purposes of this Act are—

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under titleVII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

STATEMENT OF CASE

This case was decided on Respondent's Motion for Summary Judgment. When a Motion for Summary Judgment is filed pursuant to Federal Rule of Civil Procedure 56, all evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in favor of the nonmovant. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

Respondent Dresser manufactures off-road trucks for the mining and construction industries at a facility in Peoria, Illinois. In 1985, Respondent Dresser and the union representing the Petitioners entered mid-term contract negotiations. The negotiations produced a modified collective bargaining agreement that reduced the number of positions at Respondent's Peoria plant by combining 170 single skill positions into 28 multiple skill positions.

To enact the change, Respondent Dresser and the union agreed to a program of "cross-training" which granted each employee of Respondent an opportunity to train for the new multiple-skill positions. On November 1, 1985, all employees of Respondent were classified as "second class" or "2-C" employees. When employees successfully completed the training, they were reclassified as "first class" or "1-C" employees. The employees designated as "first class" or "1-C" employees possessed the multiple skills necessary to perform one of the 28 new multiple-skill positions.

The Respondent agreed that no less than 15 percent of the bargaining unit jobs would be reserved for the second class employees. These jobs were reserved for employees who did not become first class employees. Due to the percentages, employees falling into the category of second class employees were subject to a higher percentage risk of being laid off than first class employees. The number of second class employees that exceeded the number of second class job slots would be laid off according to seniority.

Petitioners worked in Respondent's electrical assembly department manufacturing the various electrical subassembly components that were transferred to the assembly department for installation and testing in Respondent's trucks. The modified collective bargaining agreement blended the subassembly and installation jobs into a single position titled the 1-C electrical assembler position. The 1-C electrical assembler position required more physical exertion than the electrical subassembly position held by Petitioners. The Petitioners were subject to medical restrictions limiting their ability to do certain activities. In January 1986, Respondent had its doctor examine the Petitioners to decide whether the Petitioners would receive training for the 1-C electrical assembler position. Respondent's physician concluded that the Petitioners were physically unable to receive the required training for the 1-C positions. In February 1986, Respondent notified Petitioners that they would not be permitted to train for the new 1-C positions.

On February 7, 1986, the union representing Petitioners filed a general grievance on behalf of all employees of Respondent who were denied training for 1-C positions. The union claimed that Respondent violated the modified collective bargaining agreement by refusing to cross-train Petitioners and others due to alleged medical reasons. The grievances went to arbitration on January 16, 1987, and on June 5, 1987. The arbitrator found in favor of Respondent.

Nevertheless, back on February 26, 1986, Respondent permitted the Petitioners to enroll in the 1-C training program. Petitioners participated in classroom sessions of the 1-C training program from February through November of 1986. On December 8, 1986, Respondent promoted all of the 2-C electrical assemblers to 1-C electrical assemblers except for the five oldest electrical assemblers who included the Petitioners and one other employee. Petitioners Hamilton, Crank and Russell were laid off on or about February 19, 1987. Petitioner Carrell continued to work but was denied a promotion in March 1988.

Petitioners then filed charges of age and handicap discrimination with the Illinois Department of Human Rights and the Equal Employment Opportunity Commission. Petitioner Hamilton filed his charge on February 19, 1987, the day he was laid off. Petitioner Russell filed his charge on February 26, 1987, seven days after he was laid off. Petitioner Crank filed his charge on August 2, 1987, 164 days after he was laid off. Petitioner Carrell filed his charge on August 2, 1988, about 150 days after he was denied a promotion. The EEOC dismissed the charges as untimely filed and issued a right to sue letter. On February15, 1989, the Petitioners filed a multi-count complaint in the District Court alleging that Respondent violated the Age Discrimination in Employment Act, 29 U.S.C. §621, the Rehabilitation Act, 29 U.S.C. §794, et seq., the Illinois Human Rights Act, Ill.Rev.Stat. Ch.68, para.1-101 et seq. and the Illinois Constitution by refusing to train Petitioners for the 1-C positions and then laying them off on the basis of age and physical handicap. The District Court granted summary judgment for Respondent on all counts of Petitioners' Complaint. Petitioners solely appealed the District Court's decision on the ADEA counts.

Petitioners filed their appeal brief with the Seventh Circuit on August 2, 1991. Respondent filed its responsive brief on September 4, 1991. The Civil Rights Act of 1991 became effective on November 7, 1991. The Civil Rights Act of 1991

specifically overruled the decision of *Lorance v. A T & T Technologies, Inc.*, 490 U.S. 900 (1989), 1991 Civil Rights Act S.1745, Section 112, codified at 42 *United States Code* 2000e-5(e). On May12, 1992, the Seventh Circuit issued its opinion in the present case and cited the overruled *Lorance* opinion for the proposition that since Petitioners would not be reclassified as 1-C employees, because Respondent would not permit Petitioners to complete the 1-C training, "...they were more vulnerable to layoffs under the modified collective bargaining agreement." *Hamilton, Crank, Russell and Carrell v. Dresser*, Case No. 91-2472, slip op. at 6 (7th Cir. May12, 1992). The Seventh Circuit transformed the higher risk of lay off the Petitioners incurred, due to Respondent's refusal to permit Petitioners to complete the training, into an incident or decision which should have informed the Petitioners that Respondent would first deny them promotions and later subject them to layoffs. The test articulated and applied by the Seventh Circuit requires Petitioners and other similarly situated individuals to file charges of discrimination when contested decisions are made at the workplace which *might* result in an employer discriminatorily refusing to promote an employee or *could possibly* result in an employer laying off an employee due to a discriminatory decision. The "speculation" test applied by the Seventh Circuit imposes a duty on Petitioners to perceive that decisions they contend are discriminatory could by chance result in a subsequent injury or harm and file a charge of discrimination in anticipation of the actual injury or harm that might occur. The rule applied by the Seventh Circuit did not exist before *Lorance v. A T & T Technologies, Inc.*, 490 U.S. 900 (1989) and certainly no longer existed after the amendments contained in the 1991 Civil Rights Act. The decision by the Seventh Circuit constitutes a direct rejection of the principles enunciated in the 1991 Civil Rights Act and of previous decisions determining when the limitations period for filing a charge of discrimination accrues.

REASONS FOR GRANTING THE WRIT

Introduction

I. The Decision Of The Seventh Circuit To Apply The *Lorance* Decision Retroactively After Its Repeal And Refusal To Apply The Civil Rights Act Of 1991 Retroactively Involves A Conflict Among The Courts Of Appeal Over Interpreting The Retroactivity Of Federal Statutes

A. The Courts of Appeal Recognize the Split in Supreme Court Authorities on the Issue of Interpreting the Retroactive Effect of Federal Statutes.

In the present case, the Civil Rights Act of 1991 did not repeal the *Lorance* decision at the time the Petitioners and Respondent filed their briefs with the Seventh Circuit Court of Appeals. When the Seventh Circuit Court of Appeals issued its decision on May12, 1992, however, the *Lorance* decision was repealed. The action by the Seventh Circuit requires the adoption of a single standard for analyzing the Civil Rights Act of 1991 and determining if the entire Act applies retroactively, or if the procedural and remedial provisions of the Act apply retroactively, or if the Act only applies prospectively.

One line of Supreme Court authorities supports the proposition that the Seventh Circuit should have applied the provisions of the Civil Rights Act of 1991 in effect at the time it rendered its decision in May1992. *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 714-15 (1974); See also *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 281 (1969). Both cases state the general rule that legislation which becomes effective during the pending appeal of a case, and which does not contain a clear statement on retroactive application, should be applied at the time an appeals court renders its decision. An exception to the previously stated general rule

exists where applying the new law in effect at the time an appellate court renders its decision could possibly produce a manifest injustice. The balancing test for determining whether a manifest injustice will occur requires examining the nature and identity of the litigating parties, the nature of their rights, and the nature of the impact of the new law on the rights examined. *Bradley*, 416 U.S. at 717.

Five Circuit Courts of Appeals have employed the *Bradley* test and rationale and have found various statutes to apply retroactively. *Federal Deposit Insurance Corp. v. New Hampshire Insurance Co.*, 953 F.2d 478, 487 (9th Cir. 1992), (Statutory amendment retroactively applies to make claims filed by Federal Deposit Insurance Corporation timely). The Ninth Circuit had also previously held that a change of a state law limitations period during the pending litigation of a case was retroactively applicable. *Gonzalez v. Aloha Airlines, Inc.*, 940 F.2d 1312, 1316 (9th Cir. 1991).

In *Federal Deposit Insurance Corp. v. Wright*, 942 F.2d 1089 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1937 (1992), *reh'g denied*, 112 S.Ct. 3058 (1992), the Seventh Circuit retroactively applied a provision of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 in order to enforce the codification of a common law estoppel doctrine against the defendant. *Id.* at 1097.

The Eleventh Circuit held that the Civil Rights Restoration Act of 1987, Section 2, 20 U.S.C. Section 1687, applied retroactively to the litigation at hand in order to permit the plaintiff to maintain an action under the Rehabilitation Act even if the agency division for which he worked received no federal funds. *Lussier v. Dugger*, 904 F.2d 661, 665-67 (11th Cir. 1990). The amending statutory provision in *Lussier* repealed a decision of the U.S. Supreme Court which restricted the jurisdictional coverage of the Rehabilitation Act. *Id.* at 664-65, citing *Grove City*

College v. Bell, 465 U.S. 555, 570-74 (1984), *repealed by*, Rehabilitation Act, 29 U.S.C. Section 794.

The First Circuit applied *Bradley* and held that the 1986 amendment to the Age Discrimination in Employment Act applied retroactively to a plaintiff who exceeded the upper age limit of 70 previously in effect under the pre-amended ADEA. *Aledo-Garcia v. Puerto Rico National Guard Fund, Inc.*, 887 F.2d 354, 355 (1st Cir. 1989).

The Second Circuit adheres to the *Bradley* test. In *Mrs. W. v. Tirozzi*, 832 F.2d 748 (2d Cir. 1987), *on remand*, 706 F.Supp. 164 (D. Conn. 1989), the court held that the 1986 amendment to the Education of the Handicapped Act, 20 U.S.C. Sections 1400-1485, applied retroactively to provide a private right of action to the parents of a handicapped child. *Id.* at 755. In employing the *Bradley* test, the court emphasized that the statutory amendment codified congressional intent long in place which the Congress contended the Supreme Court had misinterpreted. *Id.*

In between the *Bradley* and *Bowen* analysis, there are several cases where Circuit Courts have formulated a test that primarily analyzes the new statutory provision to determine if it alters substantive rights and liabilities or enacts new procedural or jurisdictional rules. Under this analysis, statutory amendments which alter substantive liabilities will apply only prospectively and statutory amendments that impose new procedural or jurisdictional rules are applied to a currently pending case. The analysis presumes that the legislation creating the statutory amendment does not contain any legislative history indicating whether the statutory provision applies retroactively or prospectively. Opinions containing the described analysis come from the Sixth, Eighth and Eleventh Circuits. *In Re Resolution Trust Corp.*, 888 F.2d 57, 58-59 (8th Cir. 1989), *on reh'g*, 901 F.2d 694 (8th Cir. 1990) (Statutory amendment to Financial Institutions

Reform, Recovery and Enforcement Act providing for appeal of any order of remand entered by United States District Court applied retroactively); *Boddie v. American Broadcasting Companies, Inc.*, 881 F.2d 267, 269-70 (6th Cir. 1989), *cert. denied*, 493 U.S. 1028 (1990) (1986 statutory amendment to Omnibus Crime Control and Safe Streets Act limited recovery and thereby altered substantive rights and liabilities requiring prospective application of the statutory amendment); *United States v. Fernandez-Toledo*, 749 F.2d 703, 705 (11th Cir. 1985) (New statutes that affect prior rights will not apply retroactively while those that affect only procedural rights or remedy will apply retroactively. The substantive amendments to the Bail Act would not apply retroactively).

The third line of cases in the Circuit Courts reflect a split in authority which flows from the opinion in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). In the *Bowen* case, the Court stated that retroactivity was not favored in the law and congressional enactments would be construed to apply prospectively unless their language required retroactive effect. *Id.* at 208. The Supreme Court has not reconciled the contrary authorities of *Bradley* and *Bowen* or the two lines of precedent issuing from each case. While the court has recognized the tension between the two cases and their contrary lines of authority, it has declined to decide whether *Bradley* or *Bowen* controls in interpreting the retroactive application of a statute where the legislative history is ambiguous. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990), *on remand*, 1990 WL 124911 (E.D. Pa., Aug. 27, 1990) (No.Civ.A. 74-122).

The recent opinions issued by five of the Circuits Courts of Appeal illustrate which Courts follow and adhere to the *Bowen* rationale. *Wagner Seed Co., Inc. v. Bush*, 946 F.2d 918, 924 (D.C. Cir. 1991); *cert. denied*, 112 S.Ct. 1584 (1992); *Leland v. Federal Insurance Administrator*, 934 F.2d 524, 527-29 (4th Cir. 1991); *cert. denied*, 112 S.Ct. 417 (1991); *Simmons v. A.*

Lockhart, 931 F.2d 1226, 1230 (8th Cir. 1991); *Sargisson v. United States*, 913 F.2d 918, 922-23 (Fed.Cir. 1990); *DeVargas v. Mason & Hanger-Silas Mason Co. Inc.*, 911 F.2d 1377, 1390 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 799 (1991). These Courts have all found *Bowen* controlling when deciding that statutory laws do not apply retroactively unless they explicitly provide for retroactive application.

B. The Courts of Appeal and District Courts Have Created a Split of Authorities on Whether the Civil Rights Act of 1991 Applies Retroactively.

Even though three Circuit Courts of Appeal have held that the Civil Rights Act of 1991 does not apply retroactively, the split among the Circuit Courts over whether the *Bradley* or *Bowen* analysis applies is reflected in the ever increasing number of contrary District Court opinions on the issue of whether the 1991 Civil Rights Act applies retroactively.

Up to the present, three Circuit Courts have held that the Civil Rights Act of 1991 does not apply retroactively. *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929 (7th Cir. 1992), (Applies *Bowen* and holds that Civil Rights Act of 1991 would not apply retroactively); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992), (Court applies *Bowen* and *Bradley* and holds that legislative history indicates Civil Rights Act of 1991 applies only prospectively); *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir. 1992), *petition for cert. filed*, 60 U.S.L.W. 3881 (June 11, 1992) (No. 91-2001), (*Bradley* applies but court holds that it would be a manifest injustice to retroactively apply the substantive provisions providing for damages). None of the Circuit Courts have resolved the issue of whether the *Bradley* or *Bowen* analysis covers the present case.

One group of District Courts applies the *Bradley* rationale and finds that the Civil Rights Act of 1991 applies retroactively. Some of these Courts include the following: *Lee v. Sullivan*, 787

F.Supp. 921, 929-37 (N.D. Cal. 1992); *Croce v. V.I.P. Real Estate, Inc.*, 786 F.Supp. 1141, 1150 (E.D.N.Y. 1992); *Sample v. Keystone Carbon Co.*, 786 F.Supp. 527, 530-31 (W.D. Pa. 1992); *Andrade v. Crawford & Co.*, 786 F.Supp. 1302, 1305-08 (N.D. Ohio 1992), *decision adhered to on denial of reconsideration*, __ F.Supp. __, 58 Fair Empl.Prac.Cas. (BNA) 1463 (N.D. Ohio, May 5, 1992); *Aldana v. Raphael Contractors, Inc.*, 785 F.Supp. 1328, 1330-31 (N.D. Ind. 1992); *United States v. Department of Mental Health*, 785 F.Supp. 846, 53-54 (E.D. Cal. 1992); *Long v. Carr*, 784 F.Supp. 887, 890-91 (N.D. Ga. 1992); *Graham v. Bodine Electric Co.*, 782 F.Supp. 74, 77 (N.D. Ill. 1992); *Mojica v. Gannet Co., Inc.*, 779 F.Supp. 94, 97 (N.D. Ill. 1991).

The second group of District Courts applies the *Bradley* rationale but holds that where the 1991 Civil Rights Act imposes new or additional liabilities, the Act does not apply retroactively. *Ribando v. United Air Lines, Inc.*, 787 F.Supp. 827, 833 (N.D. Ill. 1992); *Kimble v. DPCE, Inc.*, 784 F.Supp. 250, 253 (E.D. Pa. 1992).

The third group of District Courts apply and adhere to the *Bowen* proposition that a statute does not apply retroactively unless it specifically states that retroactive application is proper. A representative sampling of the District Court opinions enunciating the *Bowen* rationale include the following: *Sudtelgte v. Sessions*, 789 F.Supp. 312, 313, 315 (W.D. Mo. 1992); *West v. Pelican Management Services Corp.*, 788 F.Supp. 897, 900 (M.D. La. 1992); *Oliva v. Transworld Airlines, Inc.*, 788 F.Supp. 426, 427-28 (W.D. Mo. 1992); *McCormick v. Consolidation Coal Co.*, 786 F.Supp. 563, 565 (N.D.W. Va. 1992); *Reynolds v. Frank*, 786 F.Supp. 168, 169-70 (D. Conn. 1992); *Steinle v. Boeing Co.*, 785 F.Supp. 1434, 1442 (D. Kan. 1992); *Guillory-Wuerz v. Brady*, 785 F.Supp. 889, 893 (D. Colo. 1992); *Van Meter v. Barr*, 778 F.Supp. 83, 84-85 (D.D.C. 1991).

The permanent tension that exists between the *Bradley* and *Bowen* opinions requires immediate resolution. Furthermore, resolving the present issue is heightened by the fact that numerous provisions of the 1991 Civil Rights Act directly responded to repeal or reverse various decisions by the Supreme Court.

C. A Judicial Decision Creating New Law on the Issue of the Statute of Limitations for ADEA Claims Should Not Apply Retroactively to Petitioners and Produce an Inequitable Result.

In *Lorance*, this Court created new law on the issue of when Petitioners should have received notice of the discriminatory decisions that caused Respondent to deny Petitioners' promotions and later lay them off. At no time before *Lorance* did the rule appear that a union employee must file a charge of discrimination, within the applicable limitations period, from the time a non-discriminatory collective bargaining agreement or seniority provision is adopted in a discriminatory manner. *Lorance*, 490 U.S. at 911. While this Court in *Lorance* stressed that there were closely analogous cases under the National Laborer Relations Act, it did not cite a single case where the new rule had been previously employed in a Title VII case or a ADEA case. *Id.* at 909-11. The *Lorance* decision created a new principle of law in the field of discrimination and civil rights.

Therefore, this Court should weigh the merits and demerits of retroactively applying *Lorance* by examining the history of the new legal principle, its intent and effect, and whether retroactively applying *Lorance* will further or retard its operation. *Chevron Oil Co. v. Houson*, 404 U.S. 97, 106-07 (1971). The third factor of the *Chevron* analysis compels weighing the inequity of retroactively applying *Lorance* to the Petitioners. *Id.* at 107.

The intent of the rule in *Lorance* was to restrict the jurisdiction of Title VII and other antidiscrimination laws. The Congress

overruled that intent by passing the Civil Rights Act of 1991 which reversed *Lorance* and other decisions issued by this Court. The operation of *Lorance* should be ignored given that the Congress quickly repealed and reversed the *Lorance* decision. Finally, the inequity in applying *Lorance* to dismantle the cause of action of Petitioners boldly appears from the fact that *Lorance* was decided approximately two years after Petitioners filed their charges of age discrimination. Ruling in favor of Petitioners only enables them to present their claims for adjudication; it does not result in judgment being entered against Respondent.

This Court has applied the *Chevron* three-prong analysis and held that other judicial decisions creating new law did not apply retroactively to the case at hand. *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 110 L.Ed.2d 148, 163 (1990); *St.Francis College v. Al-Khazraji*, 481 U.S. 604, 608-09 (1987), *reh'g denied*, 483 U.S. 1011 (1987); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982).

Petitioners contend that the *Chevron* analysis applies and requests that the Court prevent the inequitable result of affirming a summary judgment premised on the alleged untimely filing of charges by Petitioners according to the rule proclaimed in *Lorance*.

II. The Limitations Period For Filing A Charge Of Age Discrimination Accrued When The Petitioners Felt The Impact Or Effect Of Respondent's Prohibited Acts And Were Injured

A. The Circuits are Sharply Divided as to What Test to Apply to Decide When the Limitations Period Accrues.

Under the Age Discrimination in Employment Act (ADEA), courts have used widely varying tests to evaluate what event constitutes an accrual of the limitations period.

In *Delaware State College v. Ricks*, 449 U.S. 250, 66 L.Ed.2d 431, 101 S.Ct. 498 (1980), *on remand*, 649 F.2d 860 (1981), this Court found that the limitations period for filing a charge accrued when the Plaintiff received unequivocal notice from the College that his tenure had been denied. *Id.* at 258-59. The College unequivocally informed the Plaintiff that his tenure would be denied in one year. Furthermore, Ricks signed a one year terminal contract document containing the expiration date for his employment. *Id.*

Equating accrual of the limitations period with notice of the adverse employment decision did not provide adequate guidance to create unity among the Circuits. As a result, the Circuits have varied widely when applying the notice standard from *Ricks*. One Circuit interprets *Ricks* as requiring "unequivocal notice" of an adverse employment decision to accrue the limitations period. *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1412 (3rd Cir. 1991), 112 S.Ct. 379 (1991).

While the Third Circuit Court of Appeals applies the unequivocal notice standard to accrue the limitations period, the Fifth and Eleventh Circuit Courts of Appeals merely require a showing of reasonable notice. *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1214 (5th Cir. 1992), *Petition for cert. filed*, 60 U.S.L.W. 3829 (May 26, 1992); *Hill v. Metropolitan Atlanta Rapid Transit Authority*, 841 F.2d 1533, 1545 (11th Cir. 1988), *amended on reh'g*, 848 F.2d 1522 (1988).

In contrast to the unequivocal notice and reasonable notice standards, four Circuits have interpreted *Ricks* to merely require a showing that the employee received any notice of the adverse employment decision. *Wheeldon v. Monon Corp.*, 946 F.2d 533, 535 (7th Cir. 1991); *Olson v. Mobil Oil Corp.*, 904 F.2d 198, 200 (4th Cir. 1990); *Janikowski v. Bendix Corp.*, 823 F.2d 945, 947 (6th Cir. 1987).

The last group of Circuits has created a hybrid of the *Ricks* standard. The Second Circuit Court of Appeals observed that:

> "[t]he *Ricks-Chardon* rule need not be applied so rigidly as to require an employee to file an age discrimination charge when the employee first learns of a discriminatory plan, even though the employee's own retirement date may be as much as 30 or 35 years away. A literal application of the rule could mean that the statute of limitations would begin to run the day the employee started work, an obviously undesirable result."

O'Malley v. GTE Service Corp., 758 F.2d 818, 821 (2d Cir. 1985). Two Circuits have applied a test that relaxes the limitations period rule in line with the idea espoused in *O'Malley*. *See*, *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1991), *cert. denied*, 111 S.Ct. 2916, 115 L.Ed.2d 1079, 59 U.S.L.W. 3772, 59 U.S.L.W. 3861, 59 U.S.L.W. 3866 (1991); *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1421 (3d Cir. 1991), *cert. denied*, 112 S.Ct. 379, (1991).

In order to curb extensive litigation and give discrimination victims fair warning of their limitations periods, this Court should enunciate a test for the accrual of the ADEA limitations period.

These cases illustrate the Circuit Court's sharp split in applying *Ricks* and the need for this Court to enunciate a singular interpretation of *Ricks*. The Petitioners contend that the limitations period for filing a charge of age discrimination does not accrue upon the mere possibility of a discriminatory refusal to promote or discriminatory layoff. Two courts have held in accordance with the Petitioners' contentions. *Trumbull v. Health Care & Retirement Corp. of America*, 756 F.Supp. 532 (M.D. Fla. 1991), *affirmed*, 949 F.2d 1162 (11th Cir. 1991); *Monnig v. Kennecott Corp.*, 603 F.Supp. 1035 (D. Conn. 1985). Since Congress has repealed and reversed *Lorance*, the need for a unitary standard for determining the accrual date is overwhelming.

B. In Addition to Overruling the Decision in *Lorance v. AT&T Technologies*, the Civil Rights Act of 1991 Also Overruled *Delaware State College v. Ricks* to the Extent It Was Cited in the *Lorance* Decision.

The Civil Rights Act of 1991 amended the accrual date for Title VII limitations periods for filing a charge and stated that the day a person is injured by application of a seniority system provision is an accrual date. 42 U.S.C. section 2000e-5(e)(2). The United States Supreme Court, in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 104 L.Ed.2d 961, 109 S.Ct. 2261 (1989), held that "when a seniority system is nondiscriminatory in form and application, it is the allegedly discriminatory *application* which triggers the limitations period,..." (emphasis in original) *Id.* at 911. The Civil Rights Act of 1991 reverses the *Lorance* holding by mandating that the limitations period accrues when the employer adopts the seniority system, when a person becomes subject to the seniority system, or when an "aggrieved" person is injured by an application of the seniority system or a provision contained therein. 42 U.S.C. section 2000e-5(e)(2). Thus, it is clear that Congress passed the Civil Rights Act of 1991 amendment to repeal and reverse *Lorance*. The theory contained in *Lorance* is no longer valid. In addition, the interpretations of cases cited in *Lorance* to support its theory are also no longer valid.

This Court has consistently interpreted the statutory procedures of ADEA in accord with the procedures contained in Title VII. *E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107 (1988); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). Petitioners contend that ADEA procedures are still interpreted in accordance with Title VII procedures, including any amendments to Title VII.

C. Under the Test for Accrual of the Limitations Period Enunciated in the Civil Rights Act of 1991, the Petitioners Timely Filed their Claims.

The Petitioners were injured when all of their co-employees were promoted to 1-C status except for the Petitioners and another protected employee. Petitioners sustained an additional injury under the Civil Rights Act of 1991 when the seniority provision was applied and Petitioners were laid off. Since the Respondent's layoff of the Petitioners constitute injuries that stemmed from the application of the seniority system, they are independent injuries under the Civil Rights Act of 1991, and a new limitations period accrues for each injury.

Petitioner Hamilton filed charges with the EEOC on February 19, 1987, which was the day he was laid off and 69 days after the Respondent refused to promote him. Petitioner Russell filed charges on February 27, 1987, which was 7 days after his layoff and 76 days after the Respondent refused to promote him. Petitioner Crank filed charges on August 2, 1987, 164 days after his layoff and 233 days after the Respondent refused to promote him. Petitioner Carrell filed charges on August 2, 1988, 105 days after his layoff and 150 days after the Respondent refused to promote him. Each Petitioner's injuries due to a discriminatorily denied promotion and discriminatory layoff occurred within the 300-day limitations period contained in the ADEA. Thus, under the Civil Rights Act of 1991, each Petitioner filed timely charges with the EEOC alleging a discriminatorily denied promotion and discriminatory layoff.

CONCLUSION

For these reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the questions presented by this Petition.

Respectfully submitted,

R. WAYNE HARVEY
HARVEY & STUCKEL, Chtd.
900 River Valley Plaza
Peoria, IL 61602
(309) 671-4900

Counsel of Record for Petitioners

OF COUNSEL:
R. Wayne Harvey
Ambrose V. McCall
HARVEY & STUCKEL, Chtd.
900 River Valley Plaza
Peoria, IL 61602
(309) 671-4900

APPENDIX

APPENDIX A

Chicago District Office
Equal Employment Opportunity Commission
536 South Clark Street, Room 930A
Chicago, Illinois 60605
Telephone: 353-2713
Telecopier: 353-7355

In reply refer to:
EEOC Charge No.: 21B872760
IDHR Charge No.: 1987CF3682

Mr. James Hamilton
Box 628
Tremont, Illinois 61568

Dear Mr. Hamilton:

On February 9, 1988, the Equal Employment Opportunity Commission (EEOC) sent you a letter to inform you that we had received a copy of your charge which you filed against the above named Respondent with the Illinois Department of Human Rights (IDHR). You were also informed that your private suit rights under the Federal Age Discrimination in Employment Act (ADEA) had been preserved and that the IDHR would process your charge.

This letter is to notify you that the EEOC will not take any further action on your charge and is administratively closing its file. We again remind you of your right to pursue a lawsuit under the ADEA in Federal District Court.

You indicate in your charge that the date of the alleged discriminatory act is February 19, 1987. The ADEA provides that any person aggrieved may sue for recovery of back pay, an equal amount as liquidated damages, appropriate make-whole relief, attorneys' fees and court costs, and other injunctive and legal relief any time after 60 days from the filing of a charge, *so long*

as the suit is filed within two years of the alleged discrimination (this statute of limitations is extended to three years if the violation is shown to be willful).

The IDHR will continue to have responsibility for completing the investigation of your charge. Any questions you may have regarding the processing of your charge should be directed to them at 917-6200.

You may wish to consult a private attorney to discuss your rights and the procedure for filing a lawsuit under the ADEA. In order you to certainly protect your right to pursue a lawsuit, you must file your lawsuit before the two-year statute of limitations has run, which appears to be February 19, 1989.

If you do file a lawsuit, please notify us by sending us a copy of your complaint so that we may preserve your file.

On behalf of the Commission:

/s/ Kathleen M. Blunt
Kathleen M. Blunt
District Director

12-8-88
Date

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Apr 29, 1991

Anthony G Russell
813 E LAKE
PEORIA, IL 61614

Dear Charging Party:

The purpose of this letter is to inform you that a law was enacted on November 3, 1990 which restores the rights of many persons, possibly including you, to bring a private lawsuit under the Age Discrimination in Employment Act (ADEA). Please read all the materials we have provided you on this new law. If you have any questions on how the law may apply to your case, you may call EEOC's toll free number 1-800-USA-EEOC, the EEOC District Office that handled your charge, or you may call the state or local agency which processed your charge.

The law is the Age Discrimination Claims Assistance Amendments of 1990 (ADCAA). It is explained in more detail in the enclosed FACT SHEET. **ADCAA applies to certain age discrimination charges which were not resolved within applicable limitations periods.**

Upon our review of all the charges currently under investigation by EEOC and the State and Local Fair Employment Practices Agencies which cooperate with us, we identified your charge as one which may be affected by ADCAA.

If your charge is covered by ADCAA, as described in the enclosed Fact Sheet, you may now have extended time to sue under the ADEA son long as your lawsuit is filed by **January 26, 1992.** Section 7(c) of the ADEA, 29 U.S.C. Section 626(c), provides that any person aggrieved may sue for appropriate

relief, including backpay and employment reinstatement or promotion. If a willful violation is proved, you may recover an amount equal to backpay as liquidated damages. Persons may sue for attorneys' fees and the cost of the action.

The ADCAA also extends the limitations periods of EEOC lawsuits in some cases. If your charge is still being processed by EEOC, we are reviewing the circumstances of your charge to determine how this law may affect your case. The office which is investigating your charge will notify you when the investigation is complete. HOWEVER, THIS LETTER IS THE OFFICIAL NOTICE WHICH THE LAW REQUIRES TO INFORM YOU THAT YOUR RIGHT TO SUE UNDER THE ADEA MAY BE RESTORED.

EEOC is currently reviewing cases which may be affected by ADCAA in order to determine whether further EEOC action is warranted. However, if you believe you may want to bring an age discrimination lawsuit now, you may wish to contact EEOC immediately and/or consult with a private attorney as soon as possible. While ADCAA may permit a lawsuit to be filed as late as **January 26, 1992** prompt action is advisable. Telephone numbers for the nearest available EEOC office are printed on the back. You may contact them as necessary for additional information on your EEOC charge.

Sincerely,

/s/ James H. Troy
James H. Troy, Director
Office of Program Operations

21B872864 (21B)

INFORMATION FOR AGGRIEVED PERSONS AND THEIR ATTORNEYS

If you believe you have rights under ADCAA, as amended, you may wish to consult an attorney.

If you consult an attorney, please give the attorneys a copy of this Fact Sheet and any other materials which have been provided to you. Every effort has been made to provide you with the necessary information we have on your case. The following information may be important to an attorney considering your case.

• Availability of Records

EEOC selected your charge as one which may be covered by ADCAA, as amended, based on information obtained from our computerized Charge Data System and after a thorough search of records by our offices and by the state local agencies who conducted the investigations. If the charge was closed over two years ago, the investigative file on your charge may have been destroyed. If the charge was investigated by a state or local agency, that agency may or may not have retained your file. Your attorney should call the appropriate office to review files, where available, before deciding whether to recommend that you sue under ADCAA.

• Charges Filed Under Both ADEA and Title VII of the Civil Rights Act

If your charge complained of both age discrimination and discrimination based on race, religion, sex or national origin prohibited by Title VII of the Civil Rights Act, ADCAA does not affect whatever right to sue you may have under Title VII.

• Charges Where a Lawsuit Has Already Been Filed

If you have filed your own lawsuit based on your charge, you should determine whether your case can be expanded under ADCAA.

If the EEOC has sued on your behalf, we will review your case to see if any claims can be added as a result of ADCAA. We are giving you this notice now because ADCAA requires a notice to be given. You do not have to do anything now. We will contact you as the case develops to let you know how ADCAA affects your case.

• Charges Filed by Third Parties on Behalf of Aggrieved Persons

If you filed your charge on behalf of other persons who may have been discriminated against, they may have a right to sue under ADCAA. In most cases, we are unable to directly notify these persons because our computer system includes only the name of person who filed the charge. Therefore, we are asking you to provide a copy of this information to each person on whose behalf you filed your charge.

• Prior ADEA Lawsuits Dismissed or Otherwise not Decided on the Merits of a Non-willful Violation

Persons may be entitled to sue under ADCAA, as amended, who had previously sued under the ADEA, based on a charge which is now covered by ADCAA, who either (1) did not have the claim heard on its merits because the lawsuit was not filed within the two year statute of limitations, or the three year statute of limitations for willful violations; or (2) filed the lawsuit after expiration of the two year statute of limitations, but before the expiration of the three year statute of limitations for willful violations, and obtained a court finding of a non-willful violation (and therefore no relief).

FACT SHEET

AGE DISCRIMINATION CLAIMS ASSISTANCE AMENDMENTS OF 1990

On April 7, 1988, the President signed into law the Age Discrimination Claims Assistance Act of 1988, Public Law 100-283, 102 Stat. 78 (ADCAA). On November 3, 1990, the law was amended by the Age Discrimination Claims Assistance Amendments of 1990, Public Law 101-504. The Act restores the claims of many aggrieved persons under the Age Discrimination in Employment Act (ADEA) which were lost due to delays in investigations conducted by EEOC or the state and local agencies. Generally, under the ADEA an aggrieved person has only two years after the date of the alleged discrimination to file a claim in court, regardless of whether EEOC has completed its action on a charge.

BACKGROUND

ADCAA, as amended, covers a number of ADEA cases in which the right of persons to sue in court within two years of the date of discrimination (without having to prove a willful violation) had passed while the agency's investigation was still incomplete. It may or may not cover the rights of those alleging willful violations where the three year period has not yet expired. The right of all these persons to sue may be restored so long as the lawsuit is filed by January 26, 1992. The information below is provided for the consideration of aggrieved persons who may wish to file an ADEA lawsuit within this extended time limit.

AGE DISCRIMINATION CHARGES COVERED BY ADCAA, AS AMENDED

An ADEA charge is subject to the private suit provisions of ADCAA if —

- the charge was timely file [sic] after April 6, 1985 (ordinarily within either 180 days of the date of discrimination alleged in the charge or 300 days of the date of alleged discrimination in a State which has its own age discrimination law); and,
- EEOC or the charging party did not file suit within the applicable period (two years from the alleged discrimination in non-willful cases); and,
- the applicable period runs after April 6, 1988, but on or before May 1, 1991, and EEOC did not either
  - eliminate the alleged unlawful practice through conciliation, or
  - notify the charging party in writing of both EEOC's disposition of the charge and of the charging party's right to sue before they two years expired.

NOTE: Attorneys are advised that some courts have dismissed as untimely a claim brought after three years because willfulness was raised in the judicial complaint, whereas, the ADCAA notice provided by EEOC was based on expiration of the two year non-willful period. Allegations of willful violations should be filed within the three year limitations period where such period has not yet expired even though the ADCAA notice may indicate a later filing date is possible. The Commission requests that you notify us in the event that you file suit in Court. Your timely information to us will assist the Commission in preparing an accurate report to Congress on the implementation of the law.

Albuquerque Area Office
(505) 766-2061

Atlanta District Office
(404) 331-6093

Baltimore District Office
(301) 962-3932

Birmingham District Office
(205) 731-0082

Boston Area Office
(617) 565-3200

Buffalo Local Office
(716) 846-4441

Charlotte District Office
(704) 567-7100

Chicago District Office
(312) 353-2713

Cincinnati Area Office
(513) 684-2851

Cleveland District Office
(216) 522-2001

Dallas District Office
(214) 767-7015

Denver District Office
(303) 866-1300

Detroit District Office
(313) 226-7636

El Paso Area Office
(915) 534-6550

Fresno Local Office
(209) 487-5793

Greensboro Local Office
(919) 333-5174

Greenville Local Office
(803) 233-1791

Honolulu Local Office
(808) 541-3120

Houston District Office
(713) 653-3320

Indianapolis District Office
(317) 226-7212

Jackson Area Office
(601) 965-4537

Kansas City Area Office
(816) 426-5773

Little Rock Area Office
(501) 378-5060

Los Angeles District Office
(213) 251-7278

Louisville Area Office
(502) 582-6082

Memphis District Office
(901) 722-2617

Miami District Office
(305) 536-4491

Milwaukee District Office
(414) 297-1111

Minneapolis Local Office
(612) 370-3330

Nashville Area Office
(615) 736-5820

Newark Area Office
(201) 645-6383

New Orleans District Office
(504) 589-2329

New York District Office
(212) 264-7161

Norfolk Area Office
(804) 441-3470

Oakland Local Office
(415) 273-7588

Oklahoma Area Office
(40 illegible) 231-4911

Philadelphia District Office
(215) 597-9350

Phoenix District Office
(602) 640-5000

Pittsburgh Area Office
(412) 644-3444

Raleigh Area Office
(919) 856-4064

Richmond Area Office
(804) 771-2692

San Antonio District Office
(512) 229-4810

San Diego Area Office
(619) 557-6288

San Francisco District Office
(415) 744-6500

San Jose Local Office
illegible

Savannah Local Office
(912) 944-4234

Seattle District Office
(206) 442-0968

St. Louis District Office
(314) 425-6523

Tampa Area Office
(813) 228-2310

Washington Field Office
(202) 275-7377

Chicago District Office
Equal Employment Opportunity Commission
536 South Clark Street, Room 930A
Chicago, Illinois 60605
Telephone: 353-2713
Telecopier: 353-7355

In reply refer to:
EEOC Charge No.: 21B872860
IDHR Charge No.: 1988CF0326

Gerald R. Crank
708 West Windom Street
Peoria, Illinois 61606

Dear Mr. Crank:

On January 12, 1988, the Equal Employment Opportunity Commission (EEOC) sent you a letter to inform you that we had received a copy of your charge which you filed against the above named Respondent with the Illinois Department of Human Rights (IDHR). You were also informed that your private suit rights under the Federal Age Discrimination in Employment Act (ADEA) had been preserved and that the IDHR would process your charge.

This letter is to notify you that the EEOC will not take any further action on your charge and is administratively closing its file. We again remind you of your right to pursue a lawsuit under the ADEA in Federal District Court.

You indicate in your charge that the date of the alleged discriminatory act is February 20, 1987. The ADEA provides that any person aggrieved may sue for recovery of back pay, an equal amount as liquidated damages, appropriate make-whole relief, attorneys' fees and court costs, and other injunctive and legal relief any time after 60 days from the filing of a charge, *so long*

as the suit is filed within two years of the alleged discrimination (this statute of limitations is extended to three years if the violation is shown to be willful).

The IDHR will continue to have responsibility for completing the investigation of your charge. Any questions you may have regarding the processing of your charge should be directed to them at 917-6200.

You may wish to consult a private attorney to discuss your rights and the procedure for filing a lawsuit under the ADEA. In order you to certainly protect your right to pursue a lawsuit, you must file your lawsuit before the two-year statute of limitations has run, which appears to be February 20, 1989.

If you do file a lawsuit, please notify us by sending us a copy of your complaint so that we may preserve your file.

On behalf of the Commission:

/s/ Kathleen M. Blunt
Kathleen M. Blunt
District Director

12-8-88
Date

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE
(Dismissal)

TO: Gerald Max Carrell
1725 E. Terrace Court
Peoria Hts, IL 61614

☐ On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a)).

FROM: CHICAGO DISTRICT OFFICE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
526 SOUTH CLARK ST., ROOM
CHICAGO, ILLINOIS 60605

CHARGE NUMBER
21B883357

EEOC REPRESENTATIVE
M. Morgan, Coordinator

TELEPHONE NUMBER
886-5973

(See additional information on reverse side of this form.)

TO THE PERSON AGGRIEVED: This is your NOTICE OF RIGHT TO SUE. It is issued because the Commission has dismissed your charge. Your charges was dismissed for the following reason:

☒ No jurisdiction for the following reason, and therefore the Commission has no authority to investigate your charge further.

- ☐ The Commission has determined that you did not allege or otherwise demonstrate that you were directly affected by the practice described or effectively deferred from acting because of the practice.
- ☐ Respondent employs less than 15 employees.
- ☐ Other *(briefly state)* Untimely filed.

☐ Your charge was untimely filed with the Commission, i.e., you waited too long from the date of the action(s) of which you complained to file your charge and it was therefore outside the time prescribed by law. Therefore, the Commission cannot investigate the allegation(s) contained in your charge.

☐ You failed to provide requested necessary information, failed or refused to appear to be available for necessary interviews/conferences or otherwise refused to cooperate to the extent that the Commission has been unable to resolve your charge. You have had more than 30 days in which to respond to our final written request.

☐ The Commission has made reasonable efforts to locate you and has been unable to do so. You have had at least 30 days in which to respond to a notice sent to your last known address.

☐ The respondent has made a written settlement offer which affords full relief for the harm you alleged. At least 30 days have expired since you received actual notice of this settlement offer.

The issuance of this NOTICE OF RIGHT TO SUE terminates the Commission's investigation of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in United States District Court. IF YOU DECIDE TO SUE, YOU MUST DO SO

WITHIN 90 DAYS FROM THE RECEIPT OF THIS NOTICE OF RIGHT TO SUE: OTHERWISE YOUR RIGHT TO SUE IS LOST.

On behalf of the Commission:

6/12/90
(Date)

/s/ Marshal J. Drane

Typed Name and Title of Commission Official

Marsha J. Drane, Directorl

cc: (to respondent)
Dresser Haulpak Division

EEOC
FORM 161
July 87

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case Number: 89-1044

JAMES HAMILTON, GERALD CRANK,
ANTHONY RUSSELL, and GERALD CARRELL

v.

KOMATSU DRESSER COMPANY, a joint venture,
and DRESSER INDUSTRIES, INC.

JUDGMENT IN A CIVIL CASE

[Filed: May 24, 1991]

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, pursuant to the Order entered this date, judgment is entered in favor of the Defendants and against the Plaintiffs.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

Date: May 24, 1991

/s/ John M. Waters, Clerk

(By): /s/ Stephanie Hajny
Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case No. 89-1044

JAMES HAMILTON, GERALD CRANK,
ANTHONY RUSSELL, and GERALD CARRELL,
Plaintiffs,

v.

KOMATSU DRESSER COMPANY, a joint venture,
and DRESSER INDUSTRIES, INC.,
Defendants.

ORDER

[Filed: May 24, 1991]

Before the Court is a Motion by the Defendants for summary judgment (#11) pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court grants this Motion.

BACKGROUND FACTS

The Defendants[1], Komatsu Dresser Company, a joint venture, and Dresser Industries, Inc. (hereinafter collectively referred to as "Dresser"), manufacture off-road trucks and related items for the international mining and construction industries at the Peoria plant. (Morley affidavit ¶3). The company's production employees are represented for purposes of collective bargaining by Boilermakers Lodge No. 158.

---

[1] The Complaint names two parties as Defendants. However, Dresser asserts that, as the litigation progressed through discovery, it became clear that the actions giving rise to the case were only those of the Defendant Dresser Industries, Inc. exclusively. Dresser contends that the joint venture known as Komatsu Dresser Company was not formed until after the actions giving rise to the Complaint. It appears that the Plaintiffs do not dispute this. Therefore, any claims against Defendant Komatsu Dresser Company, a joint venture, are dismissed with prejudice.

During the mid-1980's, the company experienced a severe downturn in business. As a result, in the summer of 1985, the company and the union entered a mid-term contract negotiation. The company alleges that the purpose of the mid-term negotiation was to streamline the labor agreement to enable the company to meet competition in the industry.

A major component of the agreed mid-term contract modification that resulted from the negotiations involved a revision of the company's job analysis program. Dresser contends that, in order to allow the company greater flexibility in utilization of its work force, it reduced the number of jobs in the plant. The modification essentially combined 170 single skill jobs into 28 multiple skill jobs. (Morley affidavit at ¶6). Consequently, employees were required to possess multiple skills in order to perform a job.

Dresser asserts that the parties to the negotiations recognized that the work force would require cross-training in order to function under the new system. (Morley affidavit at ¶7). The union and the company negotiated a training program designed to allow employees a fair opportunity to learn a new job. They agreed further that the period during which employees would be given the opportunity to train would begin on November 1, 1985 and end on April 1, 1987. (Morley affidavit at ¶8).

Pursuant to the agreement, all employees were classified as "second class" or "2-C" on November 1, 1985. After successfully completing training, employees were re-classified as "first class" or "1-C." (Morley affidavit at ¶9). Thus, a first class employee is one who, through training, has acquired the multiple skills necessary to perform one of the 28 jobs remaining.

Dresser maintains that the bargaining parties also recognized that there would be individuals who, for whatever reason, would not become first class employees. To avoid eliminating all employment opportunities for these employees, the company

agreed that no less than 15% of the total number of bargaining unit jobs would be available for second class employees. (Morley affidavit ¶10). If the number of employees who failed to qualify as first class substantially exceeded the number of second class positions, the excess second class employees were subject to layoff according to seniority pursuant to the collective bargaining agreement.

The Plaintiffs in this case are present and former employees who worked in the company's electrical assembly department. The department made the various electrical sub-assembly components that are eventually transferred to the assembly department for installation in the truck for testing, and, if necessary, for troubleshooting. (Morley affidavit at ¶12). The revised job analysis program combined all of these functions (i.e., the sub-assembly, installation, and troubleshooting jobs) into one position known as the 1-C electrical assembler position. (Morley affidavit at ¶12).

In January of 1986, it came to the company's attention that the Plaintiffs were scheduled to train for 1-C jobs although they had previously been classified as subject to medical restrictions limiting their ability to work. (Morley affidavit at ¶13). To determine whether the Plaintiffs should be permitted to train for the more physically demanding installation and troubleshooting responsibilities, they were examined by the company's medical director, Dr. Robert I. Martin. (Morley affidavit at ¶14). After examining the employees, reviewing their medical histories, and observing the work required of a 1-C electrical assembler, Dr. Martin concluded that none of the Plaintiffs should be permitted to cross-train for the 1-C electrical assembler position. (Morley affidavit at ¶15).

These four Plaintiffs were among the five oldest employees in their department. (See affidavits of Hamilton, Carrell, Russell, and Crank). However, Dresser contends that these Plaintiffs

were not only persons refused training for this reason. Individual determinations made by Dr. Martin were communicated to the respective Plaintiffs in January and February of 1986. (Depositions of Hamilton at 18-19, Crank at 10-12, Russell at 11-12, and Carrell at 9-10). Thereafter, the union filed a general grievance on behalf of all employees who were denied training for this reason as well as individual grievances on behalf of the Plaintiffs and certain other employees. The union contended that the company violated the collective bargaining agreement by disqualifying the Plaintiffs and others from cross-training due to medical reasons. (Depositions of Hamilton, Crank at 10, Russell, and Carrell). The grievances went to arbitration on January 16, 1987. (Morley affidavit at ¶17). The arbitrator found in favor of the company on June 5, 1987. (Morley affidavit at ¶18).

Each Plaintiff also filed a charge of age and handicap discrimination jointly with the Illinois Department of Human Rights and the Equal Employment Opportunity Commission. James Hamilton filed on February 19, 1987 (Hamilton deposition); Gerald Crank filed on August 2, 1988 (Crank deposition); Anthony Russell filed on February 26, 1987 (Russell deposition); and Gerald Carrell filed on August 2, 1988 (Carrell deposition).

Additionally, three of the Plaintiffs filed charges of discrimination with the City of Peoria's Office of Equal Employment Opportunity. James Hilton filed in February of 1987 (Hamilton deposition at 33); Gerald Crank filed on February 25, 1987 (Crank deposition at 27); and Anthony Russell filed on March 4, 1987 (Russell deposition at 25).

The Plaintiffs' charges allege that they were selected for medical examination and denied the opportunity to train for first class positions because of their respective ages and handicaps. The following facts form the basis for their claim. Approximately one month after Dr. Martin's examinations, the Plaintiffs

met with their general foreman and union steward. Part of the meeting centered upon the Plaintiffs' concerns that, if they were restricted to the 2-C classification, their changes of being laid off were greatly increased. The Plaintiffs were told that no electricians were going to be laid off. (Affidavits of Hamilton, Carrell, Russell and Crank).

Approximately two weeks later, around February 26, 1986, the Plaintiffs began receiving the training needed to be classified as a 1-C. (See affidavits of Hamilton, Carrell, Russell and Crank). From February through November of 1986, the Plaintiffs went through 1-C training during various periods of time. (*Id.*).

On or about early December of 1986, the Plaintiffs contend that the company promoted all 2-C electrical assemblers to 1-C electrical assemblers except for the five oldest electrical assemblers and an employee named Betty Dixon. (*Id.*).

DISCUSSION

Under Counts I, III, V, VII, IX, XI, XIII, and XV, each Plaintiff alleges a cause for action for age discrimination arising under the Age Discrimination in Employment Act (29 U.S.C. § 621 *et seq.*), the Illinois Constitution of 1970, and the Illinois Human Rights Act (Ill. Rev. Stat. ch. 68, ¶1-101 *et seq.*). Counts I, V, IX, and XIII allege age claims against the Defendants jointly and Counts III, VII, XI, and XV allege claims against Dresser Industries, Inc., individually.

Also, in Counts II, IV, VI, VIII, X, XII, XIV, and XVI, each Plaintiff alleges a cause of action for handicap discrimination arising under the Rehabilitation Act of 1973 (29 U.S.C. § 794 *et seq.*), the Illinois Constitution of 1970, and the Illinois Human Rights Act (Ill. Rev. Stat. ch. 78, ¶1-101 *et seq.*). Counts II, VI, X, and XIV are addressed to the Defendants jointly, while

Counts IV, VIII, XII, and XVI are addressed to Dresser Industries, Inc., individually.

A. Do the Plaintiffs Lack Standing to Bring a Private Cause of Action Under the Rehabilitation Act of 1973?

Although Plaintiffs allege a cause of action under the Rehabilitation Act of 1973, 29 U.S.C. ¶ 794 *et seq.*, their Complaint does not allege that there is any federally funded program involved to invoke the protection of the antidiscrimination provisions of the Rehabilitation Act. *See*, 29 U.S.C. § 794. The Rehabilitation Act only provides a cause of action for a handicapped individuals who are discriminated against under a program or activity receiving federal financial assistance. *See, Foss v. City of Chicago*, 8917 F.2d 34, 35 (7th Cir. 1987); *Simpson v. Reynolds Metal Company, Inc.*, 629 F.2d 1226 (7th Cir. 1980). It provides in relevant part:

> No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded for the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any executive agency or by the United States postal Service.

29 U.S.C. § 794. In this case, it is undisputed that Dresser's Peoria facility receives no federal financial assistance of any kind. (Morley affidavit at ¶4). The Plaintiffs have not disputed any of those legal or factual assertions by Dresser. Thus, because the undisputed facts establish that Dresser is not a recipient of federal funds or federal contracts, the Plaintiffs cannot maintain an action under the Rehabilitation Act.

B. Are the Plaintiffs' Age Discrimination in Employment Act Claims Time Barred?

The timely filing of a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC") is a prerequisite to maintaining an action under the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. § 626. In a deferral state such as Illinois, an ADEA plaintiff must filed an EEOC charge within 300 days "after the alleged unlawful practice occurred . . .." 29 U.S.C. § 262(d)(2).

Dresser contends that the alleged unlawful practice occurred when the company refused to allow the Plaintiffs to cross-train for the 1-C jobs because this is the precise discriminatory act of which the Plaintiffs complained and the one which ultimately resulted in their lay offs. In response, the Plaintiffs assert that Dresser is estopped from contending that the alleged unlawful practice occurred when Dresser refused to allow them to cross-train because, after the Plaintiffs were initially denied the opportunity to train for the 1-C jobs, Dresser allowed the Plaintiffs to commence training and reconsidered the decision regarding whether or not it would allow them to fully train for the 1-C classification.

To determine whether an employment discrimination claim is time barred a court must first identify precisely the unlawful employment practice which the Plaintiffs complain of and determine when that practice occurred. *See, Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980).

The essence of the Plaintiffs' claim is that Dresser's application of the collective bargaining agreement to the Plaintiffs in this case was a veiled attempt to intentionally discriminate based upon age. More specifically, the Plaintiffs are claiming that Dresser used their medical restrictions as a pretext to prevent the Plaintiffs from training for the 1-C electrical assembler positions. Because the Plaintiffs were not allowed to train for the 1-

C electrical assembler positions, they were more likely to be laid off later as the collective bargaining agreement automatically placed 1-C employees in a higher seniority track than employees such as the Plaintiffs. The Plaintiffs were later laid off when there was a reduction in work force because they were not on the 1-C seniority track. Thus, the wrongful action complained of is not the Plaintiffs' actual termination, it is Dresser's failure to allow the Plaintiffs to train for a 1-C position.

The Plaintiffs contend that in determining what the unlawful employment practice is and when the filing period begins to run, one must determine when the employee knows, or when a reasonable person should know, that the employer has made a final decision to terminate him. *See, Bonham v. Dresser Industries*, 569 F.2d 187, 192 (3rd Cir. 1977).

This Court acknowledges that the filing period begins to run from the date that a reasonable person should know that the employer has made a *final* decision regarding the conduct which is complained of. However, this does not mean that the filing period does not begin to run until there is a final decision to terminate the employee.

In *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977), the Supreme Court rejected the continuing violation theory. Expanding on this point, the Supreme Court state in *Ricks*:

> Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action. (Citation omitted). If *Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment*. But the complaint alleges no such facts. (Footnote omitted).

Ricks, 449 U.S. at 257 (emphasis added).

In this case, the Court does not believe that the Plaintiffs have identified any acts after the denial of the right to fully train for 1-C status in January and February of 1986 which would be sufficient to state a claim for discriminatory discharge. In other words, there are no acts which occurred or continued up until the time of their termination, when there was a reduction in the work force, which would show that Dresser discriminated.

Certainly, the evidence related to equitable tolling, which will be discussed subsequently, does not provide any evidence of continuing discriminatory acts. If anything, this evidence tends to show that Dresser attempted to do everything it could to accommodate the Plaintiffs.

However, the Plaintiffs could argue that Dresser's reconsideration of its original decision constitutes an identified discriminatory act which occurred near the time of the actual termination of the Plaintiffs' employment. The Plaintiffs note that they were re-examined by Dr. Martin in early 1987 to determine whether or not they would be allowed to train for 1-C status. (*See*, Plaintiffs' response to the Defendants' Motion for Summary Judgment at 3-4, Document No. 15). The Plaintiffs also note that Gerald Carrell was re-examined by Dr. Martin another time in March of 1988 for the same purpose. (*Id.* at 4). In addition, Dresser concedes that it reconsidered its original decision. (*See*, Defendants' reply at 7-8, Document No. 17).

Despite Dresser's concession, the Plaintiffs have failed to put any evidence in the record regarding the circumstances surrounding this reconsideration. Further, as Dresser contends, there is no evidence in the record showing that this reconsideration affected the finality of its original employment decision in January and February of 1986. *See, Ricks*, 449 U.S. at 260-261. Therefore, this Court must conclude that the filing period for the statute of limitations started to run in this case when the Plaintiffs were denied the right to train for 1-C status in January and February of 1986.

The question remains whether or not estoppel can be applied to the facts of this case. Because the timeliness requirements of the ADEA have not been held to be jurisdictional, equitable estoppel can be applied to toll the running of the timeliness requirements. *See, Bonham*, 569 F.2d at 192-193; *Hart v. JT Baker Chemical Corp.*, 598 F.2d 829, 831-833 (3rd Cir. 1979). In determining whether or not the statute of limitations should be tolled, the court in *Price v. Litton Business Systems*, 694 F.2d 963, 965-966 (4th Cir. 1982) stated:

> The statute of limitations will not be tolled on the basis of equitable estoppel *unless the employee's failure to file in timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge*. An employee's hope for rehire, transfer, promotion, or a continuing employment relationship—which is all that Price asserts here—cannot toll the statute absent some employer conduct likely to mislead an employee into sleeping on his rights. (Citations omitted).

Id. (emphasis added); *see also, Lawson v. Burlington Industries, Inc.*, 683 F.2d 862, 864 (4th Cir. 1982).

The Plaintiffs assert that the application of equitable tolling is justified in this case because Dresser's conduct subsequent to their medical examination and disqualification from training gave the Plaintiffs every expectation that they would in fact be promoted to the 1-C class position. Plaintiffs assert that throughout 1986 they underwent the training required in order to become 1-C class electrical assemblers. (See affidavits of Hamilton, Russell, and Crank). Also, the Plaintiffs contend that they were told by the general foreman on or about February 13, 1986, a couple weeks before they began receiving the training required of all 1-C electrical engineers, that no electricians were going to be laid off. (*Id.*). The Plaintiffs maintain that they were never

informed that the re-training they underwent in 1986 would not result in 1-C status. They had earlier been told that the retraining was necessary in order to become a 1-C employee. The Plaintiffs note that the Defendants themselves asserted that 2-C employees would not undergo training. (McCormick deposition at 10; Morley deposition at 15).

Thus, the Plaintiffs assert that the training given to them constitutes objective conduct by the Defendants which caused the Plaintiffs to believe that the earlier disqualification from training had been rescinded and caused them to delay filing any charges of discrimination against the company.

The fact that the Plaintiffs received training after they were originally denied the right to train appeared to have surprised one of the company employees who was deposed by the Plaintiffs. (Morley deposition at 49). In Morley's deposition, the following conversation took place:

> Q: Would you be surprised then to learn that the Plaintiffs went through that training?
>
> A: I suppose so. There is no reason they would.

Id. The Plaintiffs contend that because the obvious purpose of the re-training was to be promoted to a first class employee, it was reasonable for the Plaintiffs to delay filing any charges during a time in which the company appeared to offer them the training necessary to get the promotion. The company admitted that it did reconsider whether formerly disqualified employees could to to the 1-C positions. (*Id.* at 49-50). Thus, the Plaintiffs maintain that it was reasonable to believe that Dr. Martin's examination and disqualifications of January of 1986 had been rescinded for further evaluation.

However, as Dresser notes, the Plaintiffs admitted that, after the examination of the company physician, each of them was told by Dr. Martin and their supervisor that, as a result of the

examinations, they would not be allowed to train to become 1-C electrical assemblers. As a result of this determination, the Plaintiffs, in conjunction with their union, filed grievances in January and February of 1986. These grievances requested that the Plaintiffs be given the full opportunity to train for the first class jobs. (See Plaintiffs' depositions). Thus, the Plaintiffs' conduct clearly evinces their understanding in January and February of 1986 that they were disqualified from training which could result in their ultimate ability to attain 1-C status. As Dresser maintains, this Court does not believe that the Plaintiffs can now contend that they learned that they would be denied 1-C status only after the full training program was completed and 1-C promotions were made.

In addition, after the Plaintiffs filed their grievances on February 2, 1986 in which they requested a full opportunity to train and qualify for the first class jobs, they never dropped their grievances, even during the limited training which the Plaintiffs received. Rather, it appears that they pursed their grievances through the various steps of the grievance process which led to arbitration in January of 1987. This conduct is clearly inconsistent with the position that the Plaintiffs presently advance that Dresser's conduct caused them to believe that their earlier disqualification from training had been rescinded.

Also, the fact that the Defendant reconsidered whether the Plaintiffs would be allowed to participate in full training does not necessarily effect the finality of the employment decisions made in January and February of 1986. The court stated in the *Ricks* case:

> We have already held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period. (Citation omitted) (footnote omitted).

Ricks, 449 U.S. at 261. Further, the court stated in footnote 15 that:

> Mere requests to reconsider, however, cannot extend the limitations periods applicable to the civil rights law.

Id., at n. 15.

Further, even if Dresser's reconsideration of its initial decision was independent of the grievance procedure distinguishing this case from *Ricks*, the Plaintiffs have failed to provide any evidence regarding the surrounding circumstances of this reconsideration which would show that it effected the finality of the earlier employment decisions.

The Court does not believe that the limited training they received could have reasonably led them to believe they would be permitted to qualify for 1-C status. The Plaintiffs do not assert that any representative of the company ever told them that their disqualifications had been rescinded or that, despite their physical limitations, they would be permitted to participate in full training.

The affidavit of Gary Aubry explains that it was the company's policy to allow all employees to complete as much training as they could even if they had limitations which would prevent them from completing all of the training necessary to become a 1-C employee. Thus, the Plaintiffs were allowed to complete as much of their training as they would without violating their restrictions. As Dresser notes that each Plaintiff admitted that he was permitted to participate only in the classroom portion of the training and the activity portion of the training which did not require physical exertion. The Plaintiffs were denied the opportunity to do the physical portion of the training. (Russell deposition at 27; Carrell deposition at 43-44; Hamilton deposition at 36-37; Crank deposition at 16).

Based on the foregoing, this Court concludes that the Plaintiffs have failed to create an issue of fact regarding whether or not the statute of limitations was equitably tolled by the actions of Dresser; therefore, the Plaintiffs' claims are time barred.

C. Does this Court Lack Subject Matter Jurisdiction Over the Claims Arising Under the Illinois Human Rights Act?

Each count of the Plaintiffs' Complaint alleges a cause of action arising under the Illinois Human Rights Act (IHRA), Ill. Rev. Stat. ch. 68, § 1-101. Dresser contends that the decisions interpreting the IHRA make it clear that the remedies provided therein are exclusive. Thus, Dresser contends that this Court is without jurisdiction to address these claims.

In response, the Plaintiffs contend that, pursuant to § 8-111(A)(1) of the IHRA, the Plaintiffs have exhausted their administrative remedies. The Plaintiffs note that the Equal Employment Opportunity Commission has dismissed the charges filed by Gerald Carrell and has issued a notice of a right to sue. Also, the Plaintiffs maintain that the EEOC's notice of a right to sue constitutes a final order for purposes of § 8-111. Furthermore, the Plaintiffs note that the administrative proceedings regarding the charges filed by Anthony Russell and Gerald Crank have been stayed by motion of the Defendants pending resolution of the present litigation. The stay order prevents the Plaintiffs from pursuing all of their available administrative remedies. Under these circumstances, the Plaintiffs assert that the Defendants should not be allowed to prevent the Plaintiffs from pursuing their administrative remedies and then seek summary judgment for failure of the Plaintiffs to exhaust their administrative remedies. The Plaintiffs maintain that the entry of the order staying the administrative proceedings on the Defendants' motion constitutes a waiver of the requirements that the administrative remedies be exhausted.

Initially, this Court would note that the Plaintiffs are equally at fault for the entry of the stay order in the Illinois Human Rights Commission (IHRC). The stay was granted in the IHRC because the Plaintiffs did not respond to the Defendant's Motion. (See Plaintiffs' Ex. 19).

Further, as Dresser contends, this Court lacks jurisdiction over these claims irrespective of whether or not the Plaintiffs have exhausted or even pursued their administrative remedies. Section 8-111(C) of the IHRA states:

> Limitation. Except as otherwise provided by law no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act.

Ill. Rev. Stat. ch. 68, § 8-111(C). Article 8 of the IHRA (Ill. Rev. Stat. ch. 68, § 8-101 *et. seq.*) provides for hearings on human rights complaints by the Illinois Human Rights Commission and further provides for appellate court review of decisions of that Commission in accordance with the provisions of the Administrative Review Act. *See*, Ill. Rev. Stat. ch. 110, § 3-101 *et seq.*

In *Mein v. Masonite Corp*, 92 Ill. Dec. 501, 485 N.E.2d 312, 109 Ill.2d 1 (1985), the Illinois Supreme Court held that the IHRA provides the exclusive means for redress of alleged civil rights violations. The court stated:

> The legislature has specifically provided through section 8-111(D) [now 8-111(C)] of the present Act, which is set out above, that courts have no jurisdiction to hear independent actions for civil rights violations. It is clear that the legislature intended the Act, which its comprehensive scheme of remedies and administrative procedures, to be the exclusive source for redress of alleged human rights violations. (Citations omitted).

Mein, 92 Ill. Dec. at 504. In support of its ruling, the *Mein* court found it significant that the state legislature tabled a proposed amendment to the IHRA which would have allowed civil actions in addition to or in lieu of the remedies provided in the IHRA. *Id.*

Although *Mein* addressed a claim for age discrimination, later cases reveal that its holding embraces any violation within the reach of the IHRA. *Lewis v. Collinsville Community Unit School District No. 10*, 110 Ill. Dec. 722, 723-724, 511 N.E.2d 899, 158 Ill.App.3d 411 (5th Dist. 1987); *Scott v. Sears, Roebuck and Company*, 605 F. Supp. 1047, 1053 (N.D. Ill. 1985), *aff'd*, 798 F.2d 210 (7th Cir. 1986); *Manuel v. International Harvester Company*, 502 F. Supp. 45, 49, n. 6 (N.D. Ill. 1980).

Thus, because the Plaintiffs' suit is not brought for judicial review of an administrative action or for enforcement of an administrative action, this Court has no jurisdiction over the Plaintiffs' IHRA claim.

D. Does the Court Lack Subject Matter Jurisdiction Over the Plaintiffs' Claims of Employment Discrimination Arising Under the Illinois Constitution?

Each count of the Plaintiffs' Complaint alleges a cause of action arising under the Illinois Constitution. Dresser contends that this Court lacks subject matter jurisdiction to hear the Plaintiffs' claim under the Illinois Constitution. In response, the Plaintiffs contend that they have exhausted their administrative remedies for the reasons stated earlier.

Again, as Dresser notes, this Court lacks jurisdiction over the Plaintiffs' claims under the Illinois Constitution irrespective of whether or not the Plaintiffs have exhausted or even pursued their administrative remedies. In fact, the Illinois Constitution does not prescribe age discrimination, however, it does prohibit discrimination against the handicapped. Section 19 of the Illinois Constitution provides:

> All persons with a physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer.

Illinois Constitution, Article 1, Section 19 (1970).

Where the IHRA applies, however, Illinois courts uniformly recognize that the Act is the exclusive source for redress of alleged constitutional violations. *Ritzheimer v. Insurance Counselors, Inc.*, 123 Ill. Dec. 506, 511-514, 527 N.E.2d 1281, 173 Ill.App.3d 953 (5th Dist. 1988). In *Ritzheimer*, the court held that the exclusive remedies provision of the IHRA did not preempt a direct constitutional cause of action for employment discrimination where the employer was not subject to the provisions of the IHRA because he was an employer with fewer than 15 employees. *Id.* at 513. In this case, the Plaintiffs do not contend that their employer was not subject to the provisions of the IHRA.

In *Yount v. Hesston Corp.*, 80 Ill.Dec. 231, 235, 464 N.E.2d 1214, 124 Ill.App.3d 943 (2nd Dist. 1984), the court determined that the IHRA precluded the plaintiff from bringing a private cause of action under ARticle 1, Section 19 of the Illinois Constitution for employment discrimination based upon a handicap. In holding that the circuit court was without jurisdiction to hear the claim, the court relied on the exclusive remedies provisions of the IHRA found in Ill. Rev. Stat. ch. 68, § 8-111(C) which this Court has previously discussed. *Id.*; *see also, Thakkar v. Wilson Enterprises, Inc.*, 76 Ill. Dec. 331, 333-335, 458 N.E.2d 985, 120 Ill.App.3d 878 (1st Dist. 1983); *Dilley v. Americana Health Care Corp.*, 84 Ill. Dec. 636, 637-643, 472 N.E.2d 596, 129 Ill.App.3d 537 (4th Dist. 1984); *Curtis v. Continental Illinois National Bank*, 568 F. Supp. 740, 742-743 (N.D. Ill. 1983).

In sum, because the IHRA applies to the Plaintiffs' allegations of discrimination in violation of the Illinois Constitution, the IHRA preempts the Plaintiffs' direct actions alleging constitutional violations. Thus, the Plaintiffs' remedy lies exclusively with the IHRA.

CONCLUSION

Based on the foregoing, this Court GRANTS the Defendants' Motion for Summary Judgment (#11). Also, all claims against Defendant Komatsu Dresser Company, a joint venture, are DISMISSED with prejudice. The Court directs the Clerk to enter judgment in favor of the Defendants and against the Plaintiff.

ENTERED this 24th day of May, 1991.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: May 12, 1992

BEFORE: Honorable RICHARD A. POSNER, Circuit Judge.

Honorable KENNETH F. RIPPLE, Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

No. 91-2472

JAMES HAMILTON, GERALD CRANK,
ANTHONY RUSSELL, et al.,
Plaintiffs - Appellants

v.

KOMATSU DRESSER INDUSTRIES, INCORPORATED,
a Joint Venture and DRESSER INDUSTRIES, INC.,
Defendants - Appellees

Appeal from the United States District Court for the Central Division of Illinois, Peoria Division
No. 89 C 1044, Chief Judge Michael M. Mihm

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration where, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this Court entered this date.

(1061-030690)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-2472

JAMES HAMILTON, GERALD CRANK,
ANTHONY RUSSELL, et al.,
Plaintiffs-Appellants,

v.

KOMATSU DRESSER INDUSTRIES, INCORPORATED,
A Joint Venture, and
DRESSER INDUSTRIES, INC.,
Defendants-Appellees.

Appeal from the United States District Court
from the Central District of Illinois, Peoria Division.
No. 89 C 1044—**Michael M. Mihm**, *Chief Judge*.

ARGUED DECEMBER 12, 1991—
DECIDED MAY 12, 1991

Before POSNER, RIPPLE, and MANION, *Circuit Judges*.

MANION, *Circuit Judge*. Plaintiffs-appellants, present and former employees of Komatsu Dresser Company and Dresser Industries, Inc. ("Dresser"), filed suit alleging, *inter alia*, that Dresser violated the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*. The district court granted summary judgment in favor of Dresser finding that the plaintiffs failed to timely file discrimination charges with the Equal Employment Opportunity Commission, and the plaintiffs appeal. We affirm.

I.

Dresser manufactures off-road trucks for the international mining and construction industries at a plant in Peoria, Illinois. In 1985, Dresser and the union representing its employees

entered mid-term contract negotiations. The resulting, modified collective bargaining agreement reduced the number of positions at Dresser's Peoria plant, combining 170 single-skill positions into 28 multiple-skill positions.

To accomplish this change, Dresser and the union agreed to a program of "cross-training" under which each employee would be given an opportunity to train for the new multiple-skill positions. On November 1, 1985, all employees were classified as "second class" or "2-C" employees. As they successfully completed the training, employees would be reclassified as "first class" or "1-C" employees. First class employees were employees with the multiple skills necessary to perform one of the 28 new multiple-skill positions.

Dresser also agreed that no less than 15% of the bargaining unit jobs would be reserved for second class employees. This was in recognition of the fact that there were bound to be employees who, for whatever reason, would not be able to become first class employees. Second class employees were subject to a greater risk of lay-off than first class employees. If the number of second class employees exceeded the number of second class jobs, the second class employees would be laid off according to seniority.

Plaintiffs-appellants worked in Dresser's Electrical Assembly Department making the various electrical subassembly components that were eventually transferred to the Assembly Department for installation and testing in the trucks. The modified collective bargaining agreement combined the subassembly and installation jobs into one position known as the 1-C Electrical Assembler position. The 1-C Electrical Assembler position was more physically demanding than the electrical subassembly position held by each of the plaintiffs. The plaintiffs were subject to medical restrictions limiting their ability to do strenuous work. Thus, in January 1986, to determine whether the plaintiffs should be permitted to train for the 1-C Electrical

Assembler position, they were examined by Dresser's company doctor. The company doctor concluded that the plaintiffs were physically unable to undergo the training necessary for the 1-C positions. In February 1986, Dresser notified the plaintiffs that they would not be permitted to train for the new 1-C positions.

On February 7, 1986, the union filed a general grievance on behalf of all employees denied training for 1-C positions. The union claimed that Dresser violated the modified collective bargaining agreement by disqualifying the plaintiffs (and others) from cross-training due to medical reasons. The grievances went to arbitration on January 16, 1987, and on June 5, 1987, the arbitrator found in favor of Dresser.

On February 26, 1986, soon after this grievance was initiated, Dresser allowed the plaintiffs to enroll in the 1-C training program. The plaintiffs participated in various session of the 1-C training program from February through November 1986. On December 8, 1986, Dresser promoted all the 2-C Electrical Assemblers to 1-C Electrical Assemblers—except for the five oldest Electrical Assemblers, including the plaintiffs, and one other employee. Plaintiffs Hamilton, Crank and Russell were laid off on or about FEbruary 19, 1987. Plaintiff Carrell continued to work but, in March 1988, was denied a promotion.

The plaintiffs then filed charges of age and handicap discrimination with the Illinois Department of Human Rights and the Equal Employment Opportunity Commission ("EEOC"). Hamilton filed on February 19, 1987, the day he was laid off; Russell filed on February 26, 1987, seven days after he was laid off; Crank filed on August 2, 1987, 164 days after he was laid off; and Carrell filed on August 2, 1988, about 150 days after he was denied a promotion. The EEOC dismissed the charges as untimely filed and issued a right to sue letter. On February 15, 1989, the plaintiffs filed a multi-count complaint in the district court alleging that Dresser violated the Age Discrimination and Employment Act, 29 U.S.C. § 621 ("ADEA"), the Rehabilita-

tion Act, 29 U.S.C. § 794 *et seq.*, the Illinois Human Rights Act, Ill. Rev. Stat., ch. 68, paragr. 1-101 *et seq.*, and the Illinois Constitution by refusing to train them for the 1-C positions and then laying them off on the basis of age and physical handicap.

The district court granted summary judgment for Dresser on all counts of the complaint. The plaintiffs, however, appeal only the district court's decision on the ADEA counts. The district court found that Dresser was entitled to summary judgment on these counts because the plaintiffs had failed to timely file charges with the EEOC. Timely filing a charge of age discrimination with the EEOC is a prerequisite to maintaining an action under the ADEA. 29 U.S.C. § 626(d). In a deferral state such as Illinois, an ADEA plaintiff must file an EEOC charge "within 300 days after the alleged unlawful practice occurred . . . ." 29 U.S.C. § 626(d)(2). The district court found that the unlawful employment practice occurred when Dresser refused to allow the plaintiffs to fully train for the 1-C positions in February 1986. Accordingly, the plaintiffs were required to file charges with the EEOC by December 1986, and their filings in 1987 and 1988 were too late. The district court also found that, although Dresser allowed the plaintiffs to participate in the 1-C training, equitable estoppel principles did not apply to toll the filing period. The plaintiffs dispute both findings.[1]

We review the district court's grant of summary judgment *de novo*, applying the same standard as that employed by the district court. *Stark v. Dynascan Corp.*, 902 F.2d 549, 551 (7th Cir. 1990). We will affirm the grant of summary judgment "if the pleadings, depositions, answers to interrogatories, and admis-

[1] The Plaintiffs also argue that Dresser has waived the timely filing issue by failing to raise the issue as an affirmative defense in its Answer and by admitting in the Answer that the plaintiffs had timely filed charges with the EEOC. Plaintiffs, however, have waived these waiver arguments by failing to raise them before the district court (where Dresser would have amended its Answer).

sions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c).

II.

In Illinois, an employee may bring an age discrimination suit under the ADEA only if he filed a charge with the EEOC "within 300 days after the alleged unlawful practice occurred . . . ." 29 U.S.C. § 262(d)(2); *Stark*, 902 F.2d at 551. Determining when this filing period begins to run "requires us to identify precisely the 'unlawful employment practice ' " of which the plaintiffs complain. *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980). The limitations period begins to run at "the time of the *discriminatory acts*[,]" not when "the *consequences* of the acts became most painful." *Id.* at 258. *See also Davidson v. Indiana-American Water Works*, 953 F.2d 1058, 1059 (7th Cir. 1992) ("This limitations period begins to run on the date that the defendant takes some adverse personnel action against the plaintiff, and not when the full consequences of the action are felt.").

The district court, applying *Ricks*, found that the discriminatory act was Dresser's refusal to train the plaintiffs in February 1986. Thus, the plaintiffs were required to file charges with the EEOC within 300 days of first being notified that they would not be allowed to participate in the required 1-C training, or by December 1988 filings were too late. The plaintiffs, however, argue that they timely filed charges with the EEOC because the discriminatory act did not occur until they were actually laid off in February 1987 (and, for Carrell, when he was not promoted in March 1988).

We agree with the district court that the layoffs and failure to promote were only consequences of the refusal to train. The plaintiffs could not be reclassified as 1-C employees because

they were not allowed to complete the 1-C training. Because the plaintiffs were 2-C employees, they were more vulnerable to layoffs under the modified collective bargaining agreement. It is undisputed that, under the modified agreement, if the plaintiffs had been trained and then reclassified as 1-C employees, they would not have been laid off. The plaintiffs do not claim that the seniority system in the modified agreement was itself discriminatory; the plaintiffs were laid off and denied promotion under the facially neutral seniority system because they were 2-C employees, not because of their age. The neutral application of a non-discriminatory seniority system is not itself a discriminatory act. *See Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900, 905 (1989); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). Thus, as the district court found, the only discriminatory act alleged by the plaintiffs was Dresser's initial refusal to train them for the 1-C positions, and the 300-day filing period began to run from the time Dresser made that decision and communicated it to the plaintiffs. This is so even though the effects of that decision—the eventual layoffs and failure to promote—did not occur until later. *Ricks*, 449 U.S. at 258.[2]

The plaintiffs try to avoid the effects of *Ricks* by arguing that there was a "continuing violation" of the ADEA that began when

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[2] The plaintiffs cite *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977), *cert. denied*, 439 U.S. 821 (1978), as the "leading case" for determining when the filing period of 29 U.S.C. § 626 begins to run. The court in *Bonham* held that the filing period "does not begin to run until the employee knows, or as a reasonable person should know, that the employer has made a final decision to terminate him, *and the employee ceases to render further services to the employer*. Id., at 192. This rule, of course, would help the plaintiffs tremendously because they did not "cease[ ] to render further services" to Dresser until they were laid off in February 1987. The problem for the plaintiffs is that, rather than being a "leading case," the *Bonham* rule—which was cited and followed by the Third Circuit in *Ricks v. Delaware State College*, 605 F.2d 710, 711-713 (3rd Cir. 1979)—was clearly rejected when the Supreme Court reversed *Ricks* in 1980.

Dresser refused to train them and continued until they were laid off or refused promotion. " 'To succeed under a continuing violation theory, [the plaintiffs] must demonstrate that the acts of alleged discrimination are part of an ongoing pattern of discrimination and that at least one of the alleged discrete acts of discrimination occurred within the relevant limitations period.' " *Davidson*, 953 F.2d at 1060 (quoting *Young v. Will County Dep't of Public Aid*, 882 F.2d 290, 292 (7th Cir. 1989)); *Stewart v. CPC Intern., Inc.*, 679 F.2d 117, 121 (7th Cir. 1982) ("At least one discriminatory act must have occurred within the charge-filing period."). This they failed to do. The plaintiffs do not allege any discrete acts of discrimination other than the refusal to train. As we have already explained, the layoffs (and failure to promote) are only consequences of Dresser's earlier refusal to retrain and not independent discriminatory acts. The plaintiffs do not allege, nor does the record reveal, any discrete acts of discrimination between the February 1986 refusal to train the layoffs in February 1987. "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Ricks*, 449 U.S. at 257 (citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)).

This case is indistinguishable from the many cases that have found allegations of a discriminatory act leading, some time later, to termination of employment insufficient to establish a continuing violation. *See, e.g., ricks*, 449 U.S. at 256-58 (limitations period began to run when professor informed that he was denied tenure, not when his employment was terminated one year later); *Davidson v. Indiana-American Water Works*, 953 F.2d 1058 (7th Cir. 1992) (limitations period began to run when employee was transferred to another department, not when she was "constructively discharged" four months later); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991) (limitations period began to run

when employee was told he would be terminated two weeks after a replacement was hired, not when he was terminated.

III.

The plaintiffs next contend that Dresser is equitably estopped from arguing that the EEOC charges were not timely filed. It is well settled that the limitations period of 29 U.S.C. § 626(d) is not absolute, but is subject to equitable modification. *Mull v. ARCO Durethene Plastics, Inc.*, 784 F.2d 284, 291 (7th Cir. 1986). Two distinct kinds of equitable modification apply to ADEA cases: equitable tolling and equitable estoppel. *Id.; see also Cada*, 920 F.2d at 451-52 (noting that some cases, including *Stark v. Dynascan Corp*, 902 F.2d 549 (7th Cir. 1990), inadvertently fuse the two doctrines). "The equitable tolling doctrine does not require that the plaintiff show any misconduct on the part of the defendant. Instead, equitable tolling 'permits a plaintiff to avoid the bar of the state of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim.' " *Wheeldon v. Monon Corp.*, 946 F.2d 533, 536 (7th Cir. 1991) (quoting *Cada*, 920 F.2d at 451). Thus, equitable tolling "focuses on the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant." *Mull*, 784 F.2d at 291.

Equitable estoppel, however, on which the plaintiffs rely, "focuses on the actions of the defendant." *Id.* "Equitable estoppel is available only when the employee's otherwise untimely filing was the result 'either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.' " *Id.* at 292 (citation omitted); *see also Cada*, 920 F.2d at 450 (defendant must take "active steps to prevent the plaintiff from suing in time"). To invoke the doctrine of equitable estoppel, the plaintiffs must show (1) improper conduct by Dresser and (2) their actual and reasonable reliance on such conduct. *Wheeldon*, 946 F.2d at 537; *Mull*, 784 F.2d at 292.

In this case, the plaintiffs have invoked the doctrine of equitable estoppel claiming that Dresser lulled them into not timely filing charges with the EEOC by allowing them to participate in 1-C training. In early February 1986, Dresser told the plaintiffs that they would not be allowed to train for the 1-C assembler position. But then, on February 26, 1986, shortly after the plaintiffs field grievances, Dresser allowed the plaintiffs to begin at least some of the 1-C training. The plaintiffs participated in several sessions of the 1-C training through November 1986. November 1986 is within the 300-day filing period of 29 U.S.C. § 626(d)(2). Dresser claims that the plaintiffs only received partial training; they were allowed to take the classroom portion of the training but not the physical portion. Thus, Dresser argues, the plaintiffs knew that the training would not result in their promotion to 1-C and could not have delayed filing their EEOC charges in reliance on the training.

Dresser is correct that it is entitled to summary judgment if the plaintiffs only received partial training and knew such training would not lead to promotion. If these facts are true, the plaintiffs cannot show reliance and equitable estoppel does not apply. The record, however, is far from clear. The plaintiffs each filed an affidavit stating that on or about February 26, 1986, he "began receiving" the training for the 1-C position. Dresser's Director of Employee and Labor Relations, Gary Aubry, stated in his affidavit that "[e]mployees physically unable to complete the entire training program were allowed to attend training sessions which did not exceed their physical limitations." There is no other indication in the record, however, of the type or extent of the training the plaintiffs received or if they completed the training.[3] Further, the record contains no evidence on whether or

[3] In its Reply to Plaintiffs' Response to Motion for Summary Judgment, Dresser asserted that the plaintiffs had admitted that they were only permitted to do the classroom portion of the training, citing to pages in the plaintiffs' depositions. The cited pages of the depositions, however, are not in the record.

not Dresser told the plaintiffs that they would be allowed to complete the full 1-C training and would be reclassified as 1-C employees.

Although we would prefer that the record had been more fully developed in the district court, the lack of facts in the record does not help the plaintiffs. We held above that the 300-day limitations period of 29 U.S.C. § 626(d)(2) began to run when Dresser refused to train the plaintiffs in February 1986. Thus, unless the doctrine of equitable estoppel applies to toll the limitations period, the plaintiffs' charges were not timely filed. In this motion for summary judgment, "the burden is on the plaintiff[s] to present facts which, if true, would justify equitable modification of the statute of limitations." *Stark*, 902 F.2d at 551. Since the plaintiffs have the burden of proof, they may not rest on the pleadings but must affirmatively demonstrate, by setting forth specific facts, that there is a genuine issue of material fact for trial. Fed. R. Civ. Pro. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

The only relevant fact that the plaintiffs have presented is that they were allowed to begin the 1-C training. This fact alone, however, is not sufficient to justify the application of equitable estoppel. There are no facts in the record tending to show that Dresser was attempting to lull the plaintiffs into not filing EEOC charges. The company doctor examined the plaintiffs and concluded that they were physically unable to complete the 1-C training. Then, Dresser informed the plaintiffs that they would not be allowed to train. Although the plaintiffs were later allowed to participate in some type of training, there is no evidence that the doctor changed his medical opinion or that Dresser told the plaintiffs that they would be allowed to complete the full 1-C training. The fact that Dresser, in allowing the plaintiffs to begin the training, took favorable action toward the plaintiffs is not by itself evidence of improper conduct. *Mull*, 784 F.2d at 292 ("an employer's attempts to lessen the adverse

impact of an employment decision will not as a matter of law serve to toll the limitations period"). The plaintiffs have also failed to show reliance. True, there are no admissions in the record that the plaintiffs knew they would not be allowed to complete the 1-C training. However, there are also no facts in the record tending to show that the plaintiffs did rely on Dresser's allowing them to begin the training. To the contrary, the fact that the plaintiffs continued to pursue grievances asserting that they were improperly denied the opportunity to train demonstrates that the plaintiffs did not rely on being allowed to train. If the plaintiffs believed that Dresser had changed its mind, why would they continue to pursue their grievances?

Finally, we note that the absence of facts in the record is not due to inadequate time for discovery. The type of facts which could have overcome the motion for summary judgment are within the plaintiffs' control and knowledge. The plaintiffs could have described the training they received and told us whether or not they completed the full training. The plaintiffs could have described any statements or actions by Dresser which led them to believe they had been put back on track for the 1-C positions. No such facts appear in the plaintiffs' affidavits or elsewhere in the record. We can, therefore, only assume such facts do not exist.

IV.

For the foregoing reasons, the district court's grant of summary judgment in favor of Komatsu Dresser Company and Dresser Industries, Inc. is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Supreme Court, U.S.
FILED
SEP 10 1992
OFFICE OF THE CLERK

No. 92-275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAMES HAMILTON, GERALD CRANK, ANTHONY RUSSELL and GERALD CARRELL,

Petitioners,

vs.

KOMATSU-DRESSER, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROY G. DAVIS
(Counsel of Record)
KECK, MAHIN & CATE
331 Fulton Street
Suite 640
Peoria, Illinois 61602
(309) 673-1681
Attorneys for Respondent

September 10, 1992

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Petition should be denied for failure to name the proper party respondent.
2. Whether the Petition should be denied because it raises an issue not raised in the court of appeals.
3. Whether the Civil Rights Act of 1991 should be applied to this case.
4. Whether the Civil Rights Act of 1991, even if applied to this case, would mandate a different result.

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No. 92-275

IN THE

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OCTOBER TERM, 1992

JAMES HAMILTON, GERALD CRANK,
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vs.

KOMATSU-DRESSER, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S[1] BRIEF IN OPPOSITION

REASONS WHY THE CAUSE SHOULD NOT BE HEARD BY THIS COURT

"A petition for a writ of certiorari will be granted only when there are special and important reasons therefore." Supreme Court Rule 10. As appears below, there are no special and important reasons for granting certiorari in this case.

[1] Dresser Industries, Inc. has no parent corporation. It has no subsidiaries which are not wholly owned. Komatsu, Ltd. has no parent corporation nor does it have any subsidiaries which are not wholly owned.

Summary of Argument

The Petition should be dismissed because it names "Komatsu-Dresser, Inc." as respondent when no such entity exists. There were two defendants in the district court: Dresser Industries, Inc. and Komatsu Dresser Company, a joint venture. Both were granted summary judgment. The appeal to the Seventh Circuit involved only Dresser Industries, Inc. Dresser is not named herein as a respondent.

Even if the Court were to realign the parties, the Petition should be denied because the legal issue raised in the Petition was not presented to the Seventh Circuit. The issue (*i.e.* whether the Civil Rights Act of 1991 should be applied retroactively so as to revive the Petitioners' untimely charges of age discrimination) was raised for the first time in this litigation in the Petition.

Allowing the Petitioners to raise the issue would not yield a different result from that which issued in the Seventh Circuit. The Petitioners erroneously claim that the Seventh Circuit relied upon *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261 (1991) in arriving at its decision when it is clear on the face of the opinion that it did not. The Civil Rights Act of 1991 amended Section 706(e) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-(5)(e)(2) but did not purport to change the filing requirements under the Age Discrimination in Employment Act. Consequently, the Civil Rights Act of 1991 has no application here. Moreover, the alleged discriminatory acts of which the Petitioners complain did not arise out of the application of a seniority system which is a fundamental prerequisite to applying 42 U.S.C. §2000e-(5)(e)(2) as they seek to do in this case. Finally, even if the cited statutory provision were applied,

the result would be precisely the same as that reached by the Seventh Circuit. Consequently, the Petition should be denied.

I. The Petition should be dismissed for failure to name the proper party respondent.

The defendants in the trial court were Komatsu Dresser Company, a joint venture, and Dresser Industries, Inc. (A-19)[2] In granting the defendants' summary judgment motion, the trial court ruled that defendant Komatsu Dresser Company should be dismissed from the action with prejudice (A-19, fn. 1):

> The Complaint names two parties as Defendants. However, Dresser asserts that, as the litigation progressed through discovery, it became clear that the actions giving rise to the case were only those of the Defendant Dresser Industries, Inc. exclusively. Dresser contends that the joint venture known as Komatsu Dresser Company was not formed until after the actions giving rise to the Complaint. It appears that the Plaintiffs do not dispute this. Therefore, any claims against Defendant Komatsu Dresser Company, a joint venture, are dismissed with prejudice.

The plaintiffs appealed to the Seventh Circuit the grant of summary judgment in favor of Dresser Industries, Inc. They did not appeal the grant of summary judgment in favor of Komatsu-Dresser Company.

The Petitioners' brief, in its caption and in the "List of Parties", identifies Komatsu-Dresser, Inc. as the re-

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[2] The Respondent finds the Appendix submitted by the Petitioners adequate for the purpose of disposing of the issues raised by the petition. No separate or supplemental appendix will be filed by the Respondent.

spondent. Dresser Industries, Inc. is not identified as the respondent.

Clearly, Komatsu-Dresser Company should not be a party to any further litigation herein since the Petitioners failed to appeal the trial court's grant of summary judgment to it. Thus, the instant Petition should be dismissed.

Even if the Court were to consider Komatsu Dresser Company the respondent, or *sua sponte* substitute the parties, it is clear from the argument which follows that the Petition is meritless.

II. The Petitioners herein seek to raise an issue in this Court which they did not raise in the Seventh Circuit.

The issue which the Petitioners press this Court to accept for review is whether the Civil Rights Act of 1991 applies retroactively so as to revive their untimely charges of age discrimination. Even if the Court were inclined to accept this issue for review, this case is not the proper vehicle for considering it. The Petitioners failed to raise this issue for the Seventh Circuit's consideration and they cannot raise it for the first time in this Court.

The Petitioners gloss over this issue. Their brief states (p. 12):

> "In the present case, the Civil Rights Act of 1991 did not repeal the *Lorance* decision at the time the Petitioners and Respondent filed their briefs with the Seventh Circuit Court of Appeals."

The statement is true as far as it goes. What it fails to state, however, is that the Act became effective November 7, 1991 and the case was orally argued to the Seventh Circuit on December 12, 1991. (A-38) Moreover, the case

was not decided by the Seventh Circuit until May 12, 1992.[3]

The record is silent with respect to any effort of the Petitioners to raise the retroactivity argument in the Seventh Circuit between November 7, 1991 and May 12, 1992. The Petitioners made no effort to raise the issue at oral argument nor did they seek to supplement their brief to raise this issue in the Seventh Circuit following the Act's effective date.[4] No petition for rehearing was sought.

By failing to avail themselves of the opportunity to supplement their arguments or obtain rehearing, the Petitioners deprived the Seventh Circuit of the opportunity to consider this issue prior to positing it to this Court.

Absent extraordinary circumstances, none of which appear here, arguments not considered in the court of appeals should not be presented to the Supreme Court. *Tennessee*

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[3] In this regard, Petitions Appendix contains a crucial typographical error as it identifies the date of the decision as May 12, 1991.

[4] The rules clearly anticipate the filing of supplemental materials. Federal Rule of Appellate Procedure 28(j) states:

> "When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited."

Seventh Circuit Rule 28(i) provides:

> "Counsel shall file the original letter and ten copies of the supplemental authorities. The letter shall state in a single brief sentence the proposition the authority supports but shall contain no other authority or explanation."

v. Dunlap, 426 U.S. 312, 316, 96 S.Ct. 2099, 2101 (1976). Having had ample opportunity to raise the issue in the Seventh Circuit, the Petitioners should not be allowed to press this argument for the first time before this Court.

III. On the merits, this case does not warrant review by the Court.

The essence of the Petitioners' argument in support of review is that if the Civil Rights Act of 1991 were applied retroactively in this case their charges of discrimination might be considered timely. The difficulty with their analysis, however, is that the Act would have no impact upon the result in this case even if it were applicable.

The provision of the Act which the Petitioners seek to apply in this case is Section 112(2) which added the following provision to Section 706(e) of the Civil Rights Act of 1964:

> "For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system. (42 U.S.C. §2000e-(5)(e)(2))

The above-quoted provision is touted as having overturned the Court's decision in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261 (1989). The Petitioners contend that if the Seventh Circuit had applied the newly enacted legislation, rather than *Lorance*, to this case a different result would have attached. The problem with their argument is four fold. First, the amendment changed

the cited provision of the Civil Rights Act of 1964 but not the Age Discrimination in Employment Act under which this action was filed. Second, the Seventh Circuit did not apply *Lorance* in reaching its decision. Third, the alleged discriminatory acts of which the Petitioners complain do not arise out of the application of a seniority system. Fourth, to the extent their claims are seniority related, the dates on which the system was adopted, the Petitioners became subject to it, and were allegedly injured by it are one and the same, occurring more than 300 days prior to the filing of the charge.

A. The Civil Rights Act of 1991 did not amend the filing requirements of the Age Discrimination in Employment Act.

On its face, Section 706(e) of the Civil Rights Act of 1991 purports to amend only the filing requirements of the Civil Rights Act of 1964, 42 U.S.C. §2000e-(5)(e)(2). It does not amend the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* Thus, it has no application here. Petitioners' reliance on this provision is simply misplaced.

B. The Seventh Circuit's decision does not rely upon *Lorance*.

The linchpin of the Petitioners' argument is that the Seventh Circuit relied upon *Lorance* to reach the result reflected in its opinion. This is simply not the case.

Lorance is cited once in the Seventh Circuit's opinion (A-43):

> "The neutral application of a nondiscriminatory seniority system is not itself a discriminatory act. *See Lorance v. AT&T Technologies, Inc.* 490 U.S. 900, 904 (1989) and *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

The precedent for which *Lorance* was cited this single time had nothing to do with the timeliness issue. Rather, it was cited for a proposition that remains sound to date and which was unaffected by the passage of the Civil Rights Act of 1991. Thus, the Petitioner's contention that the Seventh Circuit applied *Lorance* in a manner inconsistent with the dictates of the Act is erroneous.

Furthermore, it is clear that the Seventh Circuit's opinion, affirming the district court's opinion in this case, draws its essence from *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498 (1980) and not *Lorance*:

> "The district court, applying *Ricks*, found that the discriminatory act was Dresser's refusal to train the plaintiffs in February, 1986." (A-42)
>
> * * *
>
> "This case is undistinguishable from the many cases that have found allegations of a discriminatory act leading, some time later, to termination of unemployment insufficient to establish a continuing violation. *See, e.g., Ricks* [citation omitted]" (A-44)

In short, this case does not turn on a *Lorance* analysis. It is purely dependent upon the correct application of *Ricks*.

The Civil Rights Act of 1991 nowhere purports to overrule *Ricks*. Thus, Petitioners' contention that the Civil Rights Act of 1991 merits a different result than that reached by the Seventh Circuit is misplaced. This case does not merit review.

C. The alleged discriminatory acts of which the Petitioners complain do not arise out of the application of a seniority system.

The particular changes wrought by the Act which the Petitioners attempt to press to their advantage apply only

"to a seniority system that has been adopted for an intentionally discriminatory purpose." 42 U.S.C. §2000e-(5)(e)(2). Prior to the filing of the instant Petition, this litigation did not concern itself with the adoption of an intentionally discriminatory seniority system. Rather, the focus of this litigation was the refusal of Dresser to permit the Petitioners to train for first class or 1-C jobs in February, 1986. This clearly is how the courts below viewed this litigation.

The district court framed the issue as follows:

> "Thus, the wrongful action complained of is not the Plaintiffs' actual termination, it is Dresser's failure to allow the Plaintiffs to train for a 1-C position." (A-26)

Moreover, the Seventh Circuit specifically noted that the Petitioners herein never sought to challenge the application of a seniority system:

> "The plaintiffs do not claim that the seniority system in the modified agreement was itself discriminatory; the plaintiffs were laid off and denied promotion under the facially neutral seniority system because they were 2-C employees, not because of their age." (A-43)

In short, the seniority system argument was never raised or considered below.

Even if it had been raised, it would have been rejected. This case is analytically distinct from *Lorance*. In this case, the Petitioners were refused retraining and, consequently, placed in a more precarious seniority system than someone granted the training. Thus, there was a simple, identifiable act which resulted in their being actively removed from one seniority system (1-C) and placed in a separate, less favorable one (2-C). The adverse consequence of which they complain was, in part, immediate

and, in part, delayed. By contrast, *Lorance* simply involved an adjustment in a single seniority system which unpredictably might have future adverse consequences. It lacked any immediate adverse consequence. The case presented by *Lorance* and the instant one are analytically distinct. Even if the seniority system issue had been raised below, it clearly would have been rejected for good cause.

D. Regardless of the analysis applied, the date which triggered the running of the period within which to file a charge was February, 1986.

Even if this case were analyzed under post Act standards, the same result would attach. This is because the key date is February, 1986, regardless of the chosen method of analysis, and no charge was timely filed in relation to that date.

Assuming *arguendo* that Petitioners had complained of an intentionally discriminatory seniority system, 42 U.S.C. §2000e-(5)(e)(2) would require the filing of a timely charge following the date "when the seniority system is adopted, when [the Petitioners] became subject to the seniority system, or when [the Petitioners are] injured by the application of the seniority system or provision of the system." The three events which would trigger the running of the time limit under the amended statute all occurred no later than February, 1986.

First, it is apparent the seniority system had been adopted prior to February, 1986. Second, it is equally apparent that the Petitioners had become subject to it by February, 1986. Third, they had been injured by its application on that date. The nature of their injury is that they were forced into 2-C status and denied training to become 1-C. With the assistance of their collective bar-

gaining representative, they filed grievances on February 7, 1986 challenging their placement and eventually lost at arbitration. (A-40 and A-30) Thus, they had by February 7, 1986 felt the sting of the application of the contract modifications which relegated them to 2-C status.[5] No charge was timely filed in relation to the February, 1986 decision.

Even applying the statutory change mandated by the Act, the result in this case would be the same. Review is not warranted.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

ROY G. DAVIS
(Counsel of Record)
KECK, MAHIN & CATE
331 Fulton Street
Suite 640
Peoria, Illinois 61602
(309) 673-1681
Attorneys for Respondent

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[5] Dresser admits that this final point is not a precise "fit". This is because, as argued earlier, this is not a seniority system case. The Petitioners were 2-C, not because of the application of any seniority system, but because Dresser refused to allow them to train to become 1-C.